76-1718

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

-against-

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
Attorney for Petitioners
Municipal Building
New York, N.Y. 10007
(212) 566-2091

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THE OPINION BELOW

The opinion delivered by the Court of Appeals upon the rendering of the decree

sought to be reviewed has not been officially reported. It is attached hereto as "Appendix I".

JURISDICTION

The decree sought to be reviewed was dated and entered on January 18, 1977.

By orders dated March 4, 1977 ("Appendix II"), respondents' petition for rehearing and suggestion for rehearing en banc were simultaneously denied by the Court of Appeals.

This Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §I254(1) and

QUESTIONS PRESENTED

1. Whether sections 307(b)(1) and (b)(2) of the Clean Air Act (42 U.S.C. §1857h-5 (b)(1) and (b)(2)) bar petitioners from asserting constitutional defenses in a citi-

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JURISDICTION

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This Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1) and

QUESTIONS PRESENTED

1. Whether sections 307(b)(1) and (b)(2) of the Clean Air Act (42 U.S.C. §1857h-5(b)(1) and (b)(2)) bar petitioners from asserting constitutional defenses in a citizen's suit for the enforcement of transpor-

tation controls submitted by the Governor of the State of New York to the United States Environmental Protection Agency?

2. Whether the Clean Air Act may be interpreted, consistent with the Constitution and principles inherent in a federal system of government, to compel petitioners to enforce such transportation controls?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment to the Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article IV, Section 4 of the Constitution:

> The United States shall quarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature

cannot be convened against domestic violence.

Section 307(b)(1) and (b)(2) of the Clean Air Act (as added by 84 Stat. 1708 and amended by 88 Stat. 259):

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2), (A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

PRELIMINARY STATEMENT

This case presents the Court with the occasion to deal with the issues previously presented to it in EPA v. Brown and its companion cases, __ U.S. ___, 44 U.S.L.W. 4445 (75-909, 75-960, 75-1050, 75-1055) (May 2, 1977) and upon which the Court did not finally decide. It presents issues of the over reaching of federal power and unauthorized actions of state and local officials absent any legislative authority.

In Brown the federal government conceded that the Clean Air Act does not authorize it to coerce a State to implement a federally imposed transportation control plan by adopting regulations or

by passing legislation. In this case the Court of Appeals has held the opposite and found that the State and City are irreversibly bound to implement the transportation control plan at issue despite the need for prior legislative action and the failure of the governmental officials submitting the plan to obtain such legislation.

The holding of the Court of Appeals in this case puts it in direct conflict with the position taken by the federal government in Brown and presents the issue herein "ripe" for review by the Court.

STATMENT OF THE CASE

(1)

This is an enforcement suit, instituted by respondents pursuant to section 304 of the Clean Air Act (42 U.S.C. §1857h-2),

to compel various State and local officials to enforce the terms of the "New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls," ("transportation controls"), which were submitted to the federal government by the Governor of the State of New York, pursuant to 40 CFR §51.5(d) and section 110(a)(2) of the Act (42 U.S.C. §1857c-5(a)(2)). Petitioners are the City of New York and its executive and legislative officers now under court mandate to enact and enforce such transportation controls.

The transportation controls, the enactment of which are compelled, set forth "strategies" purportedly designed to discourage automobile travel to and in one section of New York City - the Borough of Manhattan-and thereby to bring air quality in Manhattan into conformity with standards

promulgated by the Administrator of the United States Environmental Protection Agency ("USEPA"). The controls were purported to be adopted in April, 1973, by then Governor Rockefeller in consultation with then Mayor Lindsay and were approved by USEPA in June, 1973. Neither the Governor nor the Mayor acted with the prior legislative authorization of, respectively, the New York Legislature or the New York City Council. Nor has either legislative body ever subsequently ratified the transportation controls or passed legislation authorizing State or City officials to take the steps required to implement the strategies.

In July, 1975, the respondents moved in the District Court for preliminary injunctive relief not here relevant. While that motion was sub judice respondents

moved for partial summary judgment as to four "strategies" specified in the transportation controls, to-wit:

(a) Strategy B-7, which requires the tolling of all free bridges crossing the Harlem and East Rivers, connecting the Borough of Manhattan to the other Boroughs of New York City;

(b) Strategy B-1c, which requires restrictions on taxicabs cruising in certain portions of the Borough of Manhattan;

(c) Strategy B-3, which requires the elimination of both off-street and on-street parking in certain portions of the Borough of Manhattan; and

(d) Strategy D-3, which requires the alteration of the pattern of freight deliveries to businesses in the Borough of Manhattan, so as to provide for such deliveries after regular business hours.

In August, 1975, before petitioners were required to answer respondents' motion for partial summary judgment, the District Court rendered a decision on respondents' preliminary injunction motion which included, as well, a sua sponte denial of the motion for partial summary judgment. 401 F. Supp. 1386 (S.D. N.Y.). Petitioners then moved to dismiss the action, raising the constitutional arguments more fully explicated hereinafter.

Respondents appealed from the denial of á preliminary injunction. No appeal was taken from the denial of the motion for partial summary judgment. The only Notice of Appeal served and filed was one expressly addressed to the denial of a preliminary injunction and dismissing the complaint as against the New York City Transit Authority. The issues raised by the motion for partial summary judgment were not briefed or

argued on the appeal—these issues being irrelevant to the only appeal pending. Nevertheless, and notwithstanding the limited appeal, the Court of Appeals, by decision dated April 26, 1976, went beyond the issues tendered and ordered the District Court to enter partial summary judgment on the four above-described "strategies" in favor of respondents. 535 F. 2d 165. On April 29, 1976, the District Court, in compliance with the mandate of the Court of Appeals, entered such a judgment ("Appendix III").

Indeed, the Court of Appeals by ordering partial summary judgment in the manner described frustrated the petitioners' right to submit into the record detailed factual material on all of the issues presented, including, the disastrous effect which the transportation controls will have on the City of New York.

The petitioners petitioned the Court of Appeals for a rehearing of its April 26 decision contending that the Court's disposition of the case denied petitioners an opportunity to litigate the issues raised by their motion to dismiss, which had been adjourned by stipulation pending the disposition of the appeal by the Court of Appeals. By order dated June 2, 1976, the Court of Appeals modified its mandate to permit petitioners to move before the District Court to vacate the judgment entered on April 29, 1976, on the constitutional grounds originally asserted in the motion to dismiss. The petitioners thereafter moved to vacate in the District Court. By decision dated July 13, 1976, that motion was granted to the extent that the judgment was substantially modified. 422 F. Supp. 638 (SDNY).

Petitioners and respondents cross-appealed from the District Court's order. On August 27, 1976, respondents then moved in the original appeal (i.e., the appeal decided on April 26, 1976) for the recall and clarification of the Court's mandate and the vacatur of the District Court's order modifying the judgment of April 29, 1976. Simultaneously, respondents petitioned for a writ of mandamus against the District Judge.

Under the local rules of the Court of Appeals for the Second Circuit, respondents' motion to recall the mandate was automatically referred to the same panel of the court that had originally decided the appeal. Subsequently, the petition for a writ of mandamus and the pending cross-appeals from the District Court's July 13, 1976 decision were consolidated with the

motion. The court received memoranda of law, but did not hear oral argument. On January 18, 1977, the Court of Appeals rendered the decision reinstating the April 29, 1976 judgment which petitioners seek to have reviewed by this Court. By judgment and orders dated February 18, 1977 ("Appendix IV"), the District Court implemented the mandate of the Court of Appeals.

(2)

Judge Duffy's order implementing the mandate of the Court of Appeals requires the promulgation of complex and detailed legislative programs by State and City governmental bodies and officials to achieve the overriding policy of the strategies, i.e., a progressive reduction in rush-hour entry of automobiles into the Borough of Manhattan until a fifty

percent reduction has been achieved by 1980 (Appendix IV, pp. 149 and 159).

The means by which the District Court order seeks to achieve this end are manifold. At the heart of the order and by far the most drastic means of achieving such a reduction in auto entries is the imposition of tolls on the four East River bridges and the seven Harlem River bridges which are now free. The order commands State and City officials to obtain the necessary legal authority - presumably by commanding the State and local legislatures to enact appropriate laws. Construction of the elaborate and complex toll plazas is to be completed and in operation by August 31, 1978 (Appendix IV pp. 104-5). No mention of or concern with the patently disastrous economic impact of this tolling mandate is evident in the Court of Appeals

decision. The Borough of Manhattan and, indeed, the City of New York rely most heavily on a minimum of impediments to the growth of the business and residential communities within its boundaries. Free access lies at the heart of this growth. The bridges are literally and figuratively the arteries of the City's commerce - four of the five boroughs are located on islands with the bridges as the vital links between the boroughs for the consumers and employees on whom business depends. The massive traffic snarls and potential loss of valuable real estate ratables caused by the tolling strategy and the construction of toll plazas are also not addressed. The impracticality of toll plaza construction on bridges which were never designed to accommodate them is similarly ignored.

The order also commands a total ban on all on-street parking in the "Midtown Core" area of Manhattan, stretching from Thirty-Fourth Street to Fifty-Ninth Street and from Third Avenue to Eighth Avenue effective June 14, 1977 (Appendix IV, pp.135-6). It also orders a partial ban on all legal on-street parking in the "Downtown Core" area encompassing, essentially, all streets south of Canal Street from the hours of 8 A.M. to 6 P.M., effective June 14, 1977 (Appendix IV pp.138-9). Coupled with these specific area bans on parking are orders imposing a progressively widening ban on virtually all on-street parking in Manhattan from Fifty-Ninth Street south to the tip of the island and a substantial reduction in commercially available off-street parking, with a goal of decreasing such space by

fifty percent. Expanded towing programs are also ordered, requiring substantial redeployment of police manpower and purchase of mechanical equipment to increase the tow-away capacity to 500 vehicles per day (Appendix IV, p.[136]).

The thrust of the District Court order is to compel State and local officials to reduce that commercial activity in New York City which is dependent on automobiles and truck transport. The means employed is to impose impediments to vehicle use and to clog the City's arteries with toll plazas. This order, which jeopardizes the very existence of the City of New York as a commercial center, has as its foundation an unauthorized gubernatorial and mayoral "pact" by a former Governor and a former Mayor with federal officials to take effect after their tenures of office

have expired. It compels State and municipal officers to use their powers in a manner which is antithetical to their view of what is essential for a healthy City and instead to promote their City's demise.

ARGUMENT

The decision of the Court of Appeals has profound impact upon federal-State relations generally and upon the mechanics of the Clean Air Act in particular. If permitted to stand, that decision will cause significant interference with the governmental decision-making of petitioners who, for policy and economic reasons, have determined that the transportation control "strategies" recommended by former State and local executives are infeasible and unwise. In addition, the decision grossly distorts the powers of the State Governor by holding that he has the power to contractually bind the state and its localities to policies which the legislature has not authorized or approved.

New York City is in the throes of a severe fiscal crisis, a crisis which developed <u>after</u> the transportation controls were

agreed to in 1973. As a result of that crisis, a significant contraction has occurred in the governmental services provided by the City. The police department, for example, has terminated the employment of several thousand officers. The police department is thus required to confront ever-burgeoning urban crime with a seriously depleted force. Yet, under the decision of the Court of Appeals, the City is barred from objecting to the diversion of police manpower from anticrime activities to implement traffic enforcement "strategies" developed four years ago under drastically different circumstances.

Similarly, the City will be required to engage in major site acquisition and capital construction projects in order to construct bridge toll plazas in accordance with the decision of the Court of Appeals.

Since the financial markets are likely to remain closed to the City for some time, the funding for such projects is simply unattainable. Implementation of the "strategy" requiring an alteration in the pattern of freight deliveries to businesses will likewise require the diversion of scarce resources and, perhaps more significantly, would increase labor costs and have a deleterious effect on a segment of the economic base essential to the City's revitalization.

It is a basic proposition of our federal system that the National Government may not usurp the local decision-making process in these areas of governmental concern. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976). Congress certainly may not, under the guise of implementing national policy, empower or require State

and local officials to enforce federal law.* See, e.g., In re Rahrer, 140 U.S. 545, 560 (1891); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107-8 (1860); Prigg v. Pennsylvania, 41 U.S. (16 Peters) 539, 615-16 (1842). Nor may the National Government "coerce" States and localities to implement federal policy. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

The decision of the Court of Appeals does violence to this basic proposition. By interpreting section 307(b)(1) and (b)(2) of the Clean Air Act (42 U.S.C. §§1857h-5(b)(2)) as a bar to the assertion of con-

*It certainly cannot be argued that the Transportation Control Plan (TCP) is State Law. No legislative body approved it; indeed, several of the strategies, such as imposing tolls on bridges like the Harlem River bridges (which are part of parcel of the streets), contravene State law. See Robia Holding Company v. Walker, 257 N.Y. 431, 438 (1931); N.Y. Vehichle and Traffic Law §1604, 1642 (McKinney 1970).

stitutional arguments by petitioners, the Court of Appeals has written into the statute a binding mechanism which is itself constitutionally impermissible. The Court held that unless a State challenges its plan for transportation controls within the thirty-day period prescribed by section 307(b)(1) (42 U.S.C. §1857h-5(b)(1)) there is a waiver of any constitutional or other legal defenses to a later enforcement proceeding.* Friends of the Earth, et al., v. Carey, et al., ____F. 2d____, No. 75-7497, Slip. Op. pp. 1474-75 (2nd Cir., January 18, 1977). Such a holding violates basic principles of federalism, since the effect of the Court's decision is to bind a State and its subdivision to their initial

*We note that when the transportation control plan was approved, there was no way for the City to anticipate that such approval would be interpreted so as to irreversibly bind City officials to implement the strategies.

voluntary commitments, nothwithstanding that significant changes may thereafter occur affecting the delivery of essential governmental services or State policy-making.

This Court, in Steward Machine Co. v. Davis, supra, made crystal clear that federal laws which involve State cooperation withstand constitutional challenge only so long as the State's freedom to withdraw from the federal program is preserved. Steward Machine Co. v. Davis involved the unemployment compensation provisions of the Social Security Act of 1935 (c. 531, 49 Stat. 620). A federal excise tax was imposed upon certain employers, but a credit against that tax was allowed for taxes paid to an unemployment fund established by State law which, in the judgment of the

federal Social Security Board, satisfied federally-prescribed minimum criteria. Petitioner, a business located in a State which had passed such a law in response to the federal legislation, challenged the Social Security Act on the ground, inter alia, that it violated the Tenth Amendment and principles implicit in a federal system of government, because the State law was extracted by economic pressure and because Alabama was forced to surrender powers essential to its sovereign existence.

In rejecting the petitioner's argument, Justice Cardozo observed that to sustain such a challenge there must be established the proposition that the federal law operated as a "[weapon] of coercion, destroying or impairing the autonomy of the states." 301 U.S. at 586.

A crucial factor leading Justice

Cardozo to the conclusion that Alabama was participating of its own free will was that the Social Security Act permitted a State, at its pleasure, to repeal its unemployment statute and thereby relieve itself of the obligation of satisfying the federally-prescribed criteria:

> Alabama is still free, without breach of an agreement, to change her system over night. No officer or agency of the National Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the (unemployment compensation) payments.

Id. at 595. (Emphasis added) That statement by Justice Cardozo clearly indicates that, had the federal law not preserved free choice by the States, there would have been a conflict with the Tenth Amendment. Here the conflict does arise because of the holding of the Court of Appeals that, in

effect, a State and its subdivisions are not free, once the time limitations for review under sections 307(b)(1) and (b) (2) have expired, to withdraw from a transportation control program initially voluntarily adopted, i.e., continued state and local participation is not the product of an "unfettered will."

The alternative holding of the Court of Appeals, that the transportation controls constitute a "pact" from which neither the State nor its subdivisions may withdraw, raises the same constitutional problems. See Friends of the Earth v. Carey, supra, Slip. op. at p. 1478. No authority is cited for the proposition that a "pact" is implied by law. And petitioners fail to see how a "pact" may be implied when there has been no legislative approval of the plan.

Moreover, even had there been such approval, the finding of an irreversible contract is in direct conflict with the holding of the Court of Appeals for the First Circuit in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F. 2d 875 (1st Cir. 1973). That case involved, inter alia, a challenge to the adequacy of the commitments made by Rhode Island in its voluntarily adopted air quality implementation plan. The Court of Appeals, in ruling the committments sufficient, found that in our federal system of government such assurances from the State could not, in any event, give rise to a binding "pact":

> [G]iven the mechanics of state-federal relations, it is difficult to imagine what sort of guarantee the current Rhode Island executive or legislature could give the E.P.A. to insure that adequate resources would be devoted to the plan. ...

> Such assurances might have a symbolic effect; however, they would have little more, since a governor or even a present session of the legislature cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable.

Id. at 883-84.*

Indeed in this case the transporation control plan was submitted by a former Governor and a former Mayor without even a pretext of legislative authority or action. The plan is best viewed not as a "pact" but as a statement by State and local officials as to the best way to implement National policy. It does not embody State law; rather, it is merely the former Governor's and former Mayor's idea of the best federal

*There is also dictum in the decision of the Court of Appeals in District of Columbia v. Train, 521 F. 2d 971 (D.C. Cir. 1975), vacated and remanded, ____U.S.____, 45 U.S.L.W. 4445 (No. 75-1055, May 2, 1977), indicating that State adoption of transportation controls does not give rise to a binding commitment. Id. at 982-83.

plan. From this perspective, the plan's legal force and effect under the Act is limited by the same constitutional precepts which led the EPA Administrator to concede that he had no power to order States and their subdivisions to adopt laws and regulations. See EPA v. Brown - U.S. -, 44 USLW 4445, (75-909, 75-960, 75-1050, 75-1055) (May 2, 1977).

In Brown, this court granted certiorari from four decisions of the Ninth, Fourth and District of Columbia Circuits. The constitutional question raised was whether the Clean Air Act may constitutionally require States to pass regulations or legislation to implement plans imposed by the Federal government. This Court declined to reach this issue on the basis of a concession by the federal government that it had interpreted the law to contain no requirement that a State pass

regulations to implement its transportation plan. In the case at bar, inherent in the transportation control plan is the need for State legislative enactments to comply with its requisites. For example, the implementation of the bridge toll strategies would require legislation. (See note*, p. 23 infra). The Court of Appeals, nonetheless, has mandated compliance by City officials with the transportation control plan despite the absence of legislative action and the patent inability of the Governor of the State of New York to provide or guarantee such legislation.

While this Court in Brown saw that case suffer a great deal of "shrinkage" before it got to the Court for consideration, the case at bar presents the full issue - can the Clean Air Act be used as authority to coerce government officials to implement a a plan, state adopted or federally imposed,

despite their unwillingness to comply? The Clean Air Act does not differentiate between a voluntarily adopted state plan and a federally imposed plan in this respect. (See section 113(a); 42 U.S.C. §1857c-8(a)(2)). Just as the federal EPA Administrator has no such power under the Act, neither do the federal courts have the power under the Act to force State and local officials to be the unwilling servants of National policy.

The Court of Appeals' interpretation of the plan as a binding "pact" between a former Governor and Mayor and the federal government flies in the face of the facts and the law. Voluntarily bound, a State or City is only voluntarily committed to comply. Once the right to withdraw is taken away from the State and City, as the Court of Appeals has done, the powers and the independence guaranteed to the States and its subdivisions by the Tenth Amendment

to the United States Constitution is destroyed.

Furthermore, the decision of the Court of Appeals raises questions under Article IV, section 4 of the Constitution. By virtue of the provisions of Article 9 section 2 of the New York State Constitution - a constitution approved by popular referendum - a municipality has control of its streets and property, and may only be required to exercise powers or perform duties, other than those which they self-select, when such duties are imposed by an enactment of the New York State Legislature. The Governor as the chief executive officer of the State of New York has no authority to irreversibly bind the City of New York to any transportation control plan affecting the control of city

streets without first securing legislative authorization.* If the former Governor and Mayor entered into a "pact" with the federal government which binds the City of New York, that "pact" is ultra vires and has absolutely no binding effect under New York State law.

By holding that the Governor's submission of the transportation controls under the Clean Air Act binds the City of New York, notwithstandi that State constitutional procedures have not been observed, the Court of Appeals has given the Executive Branch of the New York State Government greater powers than those chosen by the people themselves. Such a ruling

*This point has apparently been recognized by USEPA in its regulations setting forth the administrative details of accepting a State plan. 40 C.F.R. §51.6 (1976) provides that transportation control plans shall be "adopted by the State and submitted by the Governor." As noted, the State legislature never adopted this plan.

entails a direct congressional interference with the State's "republican form of government", contrary to the Guaranty Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Petitioners
Municipal Building
New York, N.Y. 10007

June, 1977

Friends of the Earth

APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Motions--September 1976
(Submitted November 1, 1976 Decided January 18, 1977).
Docket Nos. 75-7497, 76-3054

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Plaintiffs-Appellants,

-against-

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. COBB, ALFRED EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, MICHAEL LAZAR, JOHN ZUCCOTTI, MORRIS TARSHIS, PAUL O'DWYER, J. DOUGLAS CARROLL, JR., WILLIAM J. RONAN, THEODORE KARAGHEUZOFF, P.E., JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

-and-

RUSSELL E. TRAIN,

Defendant.

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Petitioners,

-against-

HONORABLE KEVIN T. DUFFY, United States District Judge for the Southern District of New York,

Respondent.

B e f o r e :

MANSFIELD, TIMBERS and MESKILL,

Circuit Judges.

Motion by plaintiffs-appellants to recall this Court's mandate of April 26, 1976, as modified on June 2, 1976, directing the United States District Court for the Southern District of New York to enforce four pollution-control strategies of the Transportation Control Plan for the Metropolitan New York City Area and to vacate an order of the district court, Kevin T. Duffy, Judge, dated July 13, 1976, holding that the Plan was enforceable against the State and City of New York only as direct polluters but that they were not obligated to enforce the Plan against others using roads, bridges or facilities controlled by the State or City. With the motion were consolidated a petition by appellants for a writ of mandamus claiming violation of this Court's mandate

and a direct appeal from the district court's decision and order.

The motion and petition are granted. The district court's decision is vacated with direction to enforce the Plan as originally interpreted by this Court.

DAVID SCHOENBROD, Esqs., Ross Sandler, Esq., Eric A. Goldstein, Esq., New York, N.Y., for Plaintiff-Appellant Natural Resources Defense Council, Inc.

W. BERNARD RICHLAND, Corporation Counsel, New York, N.Y. (Alexander Gigante, Jr., Esq., New York, N.Y., of counsel), for City Defendants-Appellees.

PETER R. TAFT, Assistant Attorney General, Edmund B. Clark, Attorney Neil T. Proto, Attorney, Michael D. Graves, Attorney, Department of Justice, Washington, D.C. (Gerald K. Gleason, Deputy Associate General Counsel, Environmental Protection Agency, Washington, D.C., of counsel), for Defendant Russell E. Train.

MANSFIELD, Circuit Judge:

For the third time the Transportation Control Plan for the Metropolitan New York Area ("the Plan"), a plan for control of that area's automobile pollution, submitted by the State of New York ("the State") to the Environmental Protection Agency ("EPA") pursuant to §110(a)(1) of the Clean Air Amendments of 1970, 42 U.S.C. §1857c-5(a) and approved by it, is before this Court. In 1974 we upheld the validity of the Plan in all material respects, see Friends of the Earth v. EPA, 499 F. 2d 1118, 1126 (2d Cir. 1974) ("Friends I"), and on April 26, 1976, we reversed a decision of the Southern District of New York denying enforcement of the Plan in a citizen suit instituted under the Clean Air Act and ordered that partial summary judgment be granted in favor of

plaintiffs enforcing four strategies of the Plan,[1] as to which the defendants were admittedly in default, see Friends of the Earth v. Carey, 535 F. 2d 165 (2d Cir. 1976)("Friends II"). We noted that the defendants' implementation of the Plan was already almost a year in default, that carbon monoxide pollution in New York City had climbed to five times the federal health standards, and that this Court could not "consistently with its duty be a party to the delaying process that has led to this

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[1] These strategies are: reductions in business district parking, selective ban on taxicab cruising, tolls on the East and Harlem River bridges, and nighttime freight movement programs. At the time of this suit the State had consented to the imposition of eight other strategies, including emissions inspections, mechanic training, enforcing existing traffic regulations, traffic management, increased express bus services, and retrofit of trucks.

situation." We ordered that consideration of the case on remand be given priority.

On April 30, 1976, Judge Kevin T. Duffy of the Southern District of New York, at first following our mandate, ordered implementation and enforcement of the four pollution-control strategies before the court and required a detailed schedule of compliance. When our attention was directed in a petition for rehearing by the City of New York ("the City") to the fact that the defendants desired to raise constitutional issues with respect to the Plan which had not previously been considered, we on June 2, 1976, denied the petition but

> "without prejudice to consideration by the United States District of New York of constitutional issues not decided prior to the entry of the order which was the subject of the notice of appeal . . . and without prejudice to

> the right of the defendants to move in the said District Court to set aside the order of the District Court dated April 30, 1976, on the aforesaid constitutional grounds."

In so ruling we did not authorize the district court to engage in reinterpretation that would contradict our own prior considered construction of it or our determination as to the scope of enforceability.

After hearing argument on the constitutional issues Judge Duffy on July 13, 1976 modified the partial summary judgment previously granted by interpreting §304 of the Act, 42 U.S.C. §1857h-2, as permitting enforcement of the Plan against the State or its subdivisions (including the City) only to the extent that they might be direct polluters but not as

obligating them, although they were the architects and sponsors of the Plan, to implement it against others despite the fact that they had agreed to do so under the terms of the Plan and they controlled, operated, and managed the roads and facilities upon which the polluting activities by others occurred.[2] His interpretation of §304 was based on the theory that Congressional use of the Commerce Clause to compel the City to enforce the Plan against others would violate the City's rights under the Tenth Amendment, as recently expounded by the Supreme Court in National League of Cities v. Usery, _____U.S._____ 44 U.S.L.W. 4974 (June 24, 1976), and

2 Judge Duffy certified the decision for interlocutory review pursuant to 28 U.S.C. §1292(b). On August 18, 1976, a Court of Appeals panel denied appellants leave to appeal.

by several other circuits in decisions holding that Congress may not order a state to draft an implementation plan or to enforce an EPA-promulgated plan. See Brown v. EPA, 521 F. 2d 827 (9th Cir. 1975), cert. granted, 44 U.S.L.W. 3681 (June 1, 1976); District of Columbia v. Train, 521 F. 2d 971 (D.C. Cir. 1975), cert. granted, _____U.S._____, 44 U.S.L.W. 3682 (June 1, 1976); and Maryland v. EPA, 530 F. 2d 215 (4th Cir. 1975), cert. granted, _____U.S._____, 44 U.S.L.W. 3682 (June 1, 1976). Relying heavily upon these decisions, the district court all but emasculated the Plan as an enforceable instrument.

Following Judge Duffy's decision, appellants promptly moved in this Court for the recall and further modification of our April 26, 1976, mandate as it had

been modified on June 2, 1976, and to vacate the district court's decision. Plaintiffs also petitioned us for a writ of mandamus against Judge Duffy, based on the claim that his decision violated our mandate and abused his discretion, which was consolidated with plaintiffs' direct appeal under 28 U.S.C. §1291 from the district court's decision.

For the reasons that follow, we find that the district court's July 13, 1976, decision violated our mandate and abused that court's discretion. Accordingly we vacate that decision. We further direct that the district court's summary judgment of April 30, 1976, be reinstated and that such further relief be issued as is required to enforce the four strategies.

A brief review of the litigation surrounding the Plan is necessary to fully understand the issues now before us. As amended in 1970, the Clean Air Act, § 101(b)(1), 42 U.S.C. §§1857, et seq., contains a comprehensive regulatory scheme designed to promote public health and welfare by reducing air pollution caused by various sources controlled or regulated by the State, including motor vehicles operated on its state highways, bridges, and other facilities. Acting pursuant to the Act the Administrator of the EPA has established standards governing maximum concentrations of specific pollutants in the air. Under the Act, state and local governments assume the primary responsibility for establishing and implementing air quality control programs to meet these standards, § 107(a), 42 U.S.C.

§ 1857c-2. Section 110(a)(1) of the Act, 42 U.S.C. § 1857c-5(a)(1), requires each state to submit to the EPA a plan for "implementation, maintenance, and enforcement" of these standards, which the EPA must approve if the plan satisfies the statutory criteria, see § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). If a state fails to submit a plan or if its plan fails to meet the criteria, the EPA is obligated to prepare and promulgate a substitute plan for that state, § 110(c), 42 U.S.C. §1857c-5(c)(1), which may be enforced by the EPA.

On April 30, 1971, the EPA Administrator promulgated national primary and secondary air quality standards for six pollutants, following which each state was obligated under the Act to submit

its implementation plan for these pollutants, including transportation controls necessary to attain primary air quality standards. If a state did not submit a plan of its own, it faced the promulgation and enforcement by the Administrator of an EPA-prepared plan. The State of New York, with the assistance of the Department of Air Resources of the New York City Environmental Protection Administration and other city agencies, prepared and promulgated the Plan here at issue to meet the primary standards for carbon monoxide, hydrocarbons, oxidants, and nitrogen dioxide in the New York City

Metropolitan area.[3] The Plan, containing

[3] The Plan refers at the outset to the "cooperation and extensive effort" of the New York City agencies in its preparation, stating:

> "Preparation of this plan has required cooperation and extensive effort by many individuals and agencies. In particular, staff of the Department of Air Resources of the New York City Environmental Protection Administration made a major contribution through expert dedicated effort. Other city, state, and regional agencies provided valuable assistance."

In his letter dated April 17, 1973, submitting the Plan to Hon. William D. Ruckelshaus, Administrator of the EPA for approval, Governor Nelson A. Rockefeller stated that "The City of New York has worked with us in developing this plan" and quoted a letter received from Mayor John V. Lindsay, dated April 16, 1973, which, while expressing reservations as to the City's capability of financing the costs of implementing the Plan, stated that "New York City is committed to meeting Federal air standards under the Clean Air Act of 1970," that "We have cooperated in the development of the New York City Metropolitan Air Quality Implementation Plan proposed by the State and are convinced that the plan accurately reflects the scale of effort and types

32 specific strategies, is designed to meet

of measures which must be undertaken to meet the 1975 air standards." Mayor Lindsay further stated, "We must make a sincere effort over the coming months to examine the public costs and explore appropriate new revenue sources. Upon Federal approval of the plan and a commitment of adequate fiscal resources, the City will support and will move to implement the measures necessary to meet the Federal requirements for cleaner air."

Governor Rockefeller's letter of submission further advised the Administrator of EPA that "To carry out the Federal mandate set forth in the Clean Air Act of 1970, the State and the City have no alternative but to implement the following primary 'strategies' (actions under the overall plan) as rapidly as possible". There follow a list of strategies which include those which were the subject of the order here at issue. The Governor further advised that he was submitting to the New York State Legislature bills to implement some of the strategies, that

> "The State and City of New York are ready to commit to major innovations to reduce the pollution from transportation sources in the metropolitan area. Both the City and the State, however, will require new funding to support this program--both money to administer the program and assistance in making capital

"primary ambient" (outdoor surrounding air) standards and to attain "secondary ambient" standards "requisite to protect the public welfare from any known or anticipated adverse effects associated with" air pollution. The Plan was submitted to the EPA after public notice and hearings, and was approved by the EPA on June 22, 1973, with

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investments necessary to bring about required improvements in mass transit.

"Congress has mandated; Congress should also provide necessary funds. An important facet of this action by Congress should be to allow urban states to use their share of highway trust funds for mass transit."

certain revisions.[4]

In 1974 some of the plaintiffs in this action sought review of the Plan pursuant to § 307(b)(1) of the Act, 42 U.S.C. §1857h-5(b)(1), on the grounds that it was vague and inadequate and that the State has failed to provide "adequate assurances" that there would

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4 We considered the principal New York implementation plan in Natural Resources Defense Council v. EPA, 494 F. 2d 519 (2d Cir. 1974). However, that plan did not include the transportation plan at issue in the present case because the Administrator had granted an extension of the date for the submission of the plans, and the date of compliance with applicable standards was extended to May 31, 1977. Subsequently, the District of Columbia Circuit in Natural Resources Defense Council v. EPA, 475 F.2d 968 (1973), invalidated that extension and the date for submission of the State of New York plan was set at April 15, 1973, with the date of compliance with air quality standards set at May 31, 1973. See Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).

be sufficient funds to implement it. The State joined the EPA in defending the Plan, which we upheld in all substantive respects. Among other things we directed the Administrator to "provide a detailed document of this rationale" as to the basis for the EPA's determination that adequate State resources had been committed to the Plan. Friends I, 449 F. 2d 1118, 1126 (2d Cir. 1974). We declined in that action to order immediate implementation of the Plan for the reason that jurisdiction in the suit rested on § 307(b) (1) of the Act, which is restricted to reviewing the correctness of the Administrator's approval of a state plan. We noted, however, that § 304 of the Act was available to citizens to bring suit in the district court to enforce implementation of the Plan in the

the event of the failure of the State to do so.

In Friends II, supra, the present plaintiffs brought suit pursuant to § 304 of the Act, 42 U.S.C. §1857h-2, which provides that

> "any person may commence a civil action on his own behalf--(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Admendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation...."

The section defines the term "emission standard or limitation" to include "a schedule or timetable of compliance ... which is in effect under this

chapter ... or under an applicable implementation plan."

We held in Friends II that the City and State were required to implement the four strategies which were before the court, concluding that after our prior review of the EPA's approval of the State-promulgated Plan it became "controlling and must be carried out by the state" and "binding upon and enforceable against state and local officials." 535 F.2d 169, 170. We examined the citizen suit provisions of the Act, § 304, and concluded that the district court could not escape enforcing the Plan on the grounds that the EPA was negotiating with the State concerning the Plan or that the task of enforcing the Plan would be unduly burdensome to administer, stating:

> "The plaintiffs' right under the Act to seek such an enforcement order is beyond challenge. . . . They have fully discharged their responsibility to provide statutory notice..... We cannot disregard the frank statement made by New York State's Assistant Attorney General some two years ago, that this "is a legally enforceable plan ... a legally adequate plan,' and that '[i]f there is a valid legal ground for. . .a refusal [to enforce the Plan], we have not been able to find it. . ."
> 535 F. 2d at 178-80.

We held that the district court had "abused its discretion" in "denying citizen enforcement of the lawfully established Plan," and we mandated immediate relief.

Upon remand the district court, in its decision of July 13, 1976, held that the City was not barred from advancing arguments against enforcement by the 30-day limitation of § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), stating:

> "[T]he plaintiffs mistake the nature of the City's motion. The motion does not seek to challenge the action of the Administrator in approving the [Plan]; rather it challenges the interpretation of §304 by plaintiffs and is properly raised in this proceeding. Moreover, as noted above, the Court of Appeals in its denial of the City's motion to rehear, endorsed the City's right to make the present motion."

Thus, notwithstanding our decision that the State-promulgated Plan "became binding upon and enforceable against state and local officials" through a citizen suit pursuant to §304, the district court concluded that our mandate did not preclude it from determining "Who must enforce the plan and against whom it may be enforced." Judge Duffy then concluded that the Act did not obligate the State and its subdivisions to enforce it, even though they had prepared it, promulgated it, represented in it

that the Plan would be enforced by the State and City through their agencies, and on that basis had sought and obtained EPA approval of it.

In interpreting §304(a) of the Act, 42 U.S.C. §1857h-2(a), as authorizing citizen suits against states and their subdivisions only for non-compliance based on their own actual pollution rather than upon their failure or refusal to enforce a state-promulgated plan, Judge Duffy reasoned that to interpret the Act as permitting a citizen or the EPA to obtain a court order requiring the State or City to enforce a state-promulgated plan approved by the EPA would pose the same constitutional hurdles as those suggested in Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), cert. granted, 44 U.S.L.W. 3681

(June 1, 1976), and District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), cert. granted, 44 U.S.L.W. 3682 (June 1, 1976),[5] where the courts held that unless the Act was interpreted to preclude the federal government from imposing sanctions on a state or its officials for failure to implement or enforce EPA-promulgated anti-pollution regulations, the use of the federal commerce power to do so might violate the Tenth Amendment and the Constitution's guarantee of a republican form of government to the states, Const.

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5 Two factually and legally similar cases are Maryland v. EPA, 530 F. 2d 215 (4th Cir. 1973), cert. granted, 44 U.S.L.W. 3682 (June 1, 1976), and State of Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975), cert. granted, 44 U.S.L.W. 3681 (June 1, 1976).

Art. IV, §4. Said the district court:

> "Once a plan has been approved by the Administrator it is in the same posture as a plan which the Administrator has promulgated for the purposes of enforcement ....
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> "In view of the fact that the TCP [the Plan] was submitted by the Governor alone without any legislation ... it cannot be said that any binding commitment to enforce the plan was ever made by Governor alone without the state. Thus, the Governor's submission was the functional equivalent of the suggestions of an interested party at hearings the Administrator might have held on his own plan."

Judge Duffy concluded that "The only option available to the Administrator when the state does not enforce a plan is to enforce the plan himself and to sue the actual polluters or violators of the plan's requirements."[6]

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6 The district court analyzed each of the four strategies under consideration in the case to determine the extent to which it imposed duties upon the State as a direct or indirect polluter, rather than requiring the State to enforce strategies against

Appellants contend that the district court's decision and holding violate our citizen polluters. With respect to the Central Business District Parking strategy, the court found enforceable the State's incentive program for private garage owners to abandon their facilities, the State's plan to purchase private garages, and certain planning and data collection programs to be undertaken by the City and State. The court found that reduction of on-street parking and a freeze on new permits for off-street garages would be permissible.

With respect to the Taxi-Cruising Limitation strategy, the court found that data collection, public education programs and plan formulation were outside the scope of a proper order, but that a plan to restrict taxi licensing might be enforceable. The After-Hours Delivery strategy, designed to limit deliveries during heavy-traffic hours, was held enforceable only to the extent that the defendants themselves were deliverers or receivers of goods. Finally, with respect to the imposition of tolls on the East and Harlem River bridges, designed to discourage automobile traffic from entering Manhattan, the district court found that the State could not be required to construct toll facilities, and it accepted the position of the Federal Highway Administrator that at least four of the bridges, constructed with federal funds, could not be tolled by the State. However, in a later

April 26 and June 2 mandates, and is contrary to controlling legal principles. We agree.

DISCUSSION

At the outset we face the question of whether the City has standing to claim that enforcement of the State-promulgated Plan represents an unwarranted invasion of its sovereignty in violation of the Tenth Amendment. Appellants argue that since the Tenth Amendment protects only state governments the claim may only be asserted by the State, which has not challenged the enforcement of the Plan

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opinion letter dated June 28, 1976, which was submitted to the district court by the United States Attorney's Office, this time the General Counsel of the Department of Transportation, the Federal Housing Administrator's superior, advised that there is no federal bar to tolling the four bridges as part of a traffic control program pursuant to the Clean Air Act.

against it, and not by the City. We disagree.

The City claims that a judgment directing it to enforce the Plan would interfere with its governmental interests in allocating funds, police resources and in making policy decisions. In its recent decision in National League of Cities v. Usery, 44 U.S.L.W. 4974 (June 24, 1976), the Supreme Court held that Congress is prohibited by the Tenth Amendment from using its power under the Commerce Clause to impair "attributes of sovereignty attaching to every state government" and that these attributes extend to a state's political subdivisions, including local governmental units. Said the Court: "Interference with integral governmental services

provided by such subordinate arms of a state government is therefore beyond the reach of Congressional power under the Commerce Clause just as if such services were provided by the state itself." Id. 4980, n. 20. The Court further made it clear that the federal Commerce Clause may not "impermissibly interfere with traditional governmental functions," which were defined to include "such areas as fire prevention, police protection, sanitation, public health and parks and recreation," 44 U.S.L.W. 4979.

Applying these standards, the City's claim satisfies traditional notions of standing since the City is allegedly threatened with injury to its governmental interests and is within the class of entities which the Supreme Court has held to be protected from incursions of

federal power. See Warth v. Seldin, 422 U.S. 490, 498-502 (1975). Where a state has delegated to a city as one of its subdivisions the furnishing of services which constitute part of traditional governmental functions, the city has standing to raise a claim of impermissible interference with "those fundamental decisions upon which their systems for performance of these functions must rest...." National League of Cities v. Usery, supra, 44 U.S.L.W. at 4979.

Nor does the City lack standing because of the failure of its creator, the State, to join in its claims. It is true that the State has not only failed to join the City in asserting the latter's defenses to enforcement of the Plan but, to the contrary, has defended the Plan and concedes that it is enforceable

against it. However, we are not faced with a situation in which enforcement is sought solely against the State, or with a challenge by the City directed against a State-implemented statute, in either of which events the City might lack standing, see, e.g., New York v. Richardson, 473 F. 2d 923 (2d Cir.), cert. denied, 412 U.S. 950 (1973). Instead, this enforcement proceeding is directed against the City and its officials. To the extent that the State has delegated certain sovereign powers to the City and left it up to the City to comply with the Plan, the State's failure to join in the City's claim does not eliminate the City's claim that it will be directly injured in the performance of governmental functions by the allegedly impermissible exercise of federal power. The City therefore has standing.

Appellants next contend that the district court should have denied the City's motion to vacate the partial summary judgment previously entered against it on the ground that the City was precluded from making the motion by §307(b)(2) of the Act, which bars any defense in an enforcement proceeding for "which review could have been obtained" in a petition for review of the Administrator's approval of a plan. Appellants contend that the arguments that enforcement of the Plan would violate the City's Tenth Amendment rights and that the Plan should be enforceable only against the State and City as direct polluters, could have been raised by a petition for review filed by the City within 30 days after the Administrator's approval of the Plan and cannot therefore be asserted

at this late date.

The purpose of § 307 was to assure that once an implementation plan had been promulgated by a state and approved by the EPA and a reasonable time had been allowed for affected parties to seek by way of a petition for review to have it modified or nullified, it would have finality and become enforceable. If states and their subdivisions, after preparing and through their responsible executives accepting the obligation of enforcing implementation plans under the Act, were allowed to disregard their commitments and to renege upon the obligations undertaken by them, the plans would amount to nothing more than voluntary, unenforceable declarations of principles. Congress was authorized by the Commerce Clause, and clearly intended,

to accomplish more. As Senator Muskie, the floor manager of the Senate version of the Act stated, "Federal enforcement under section 113 leaves the primary responsibility with the States for enforcing requirements under implementation plans," 116 Cong. Rec. 42385 (1970).

In order to protect public health effectively Congress provided that such plans, after fair allowance for due process, would be enforceable. For these reasons §307 has been upheld as a bastion of enforceability. See Union Electric Co. v. EPA, 44 U.S.L.W. 5060 (June 25, 1960); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

Were we now confronted with a claim that the State and City had until recently been unaware of the scope, terms and reach of the Plan or of the scheme for its enforcement and hence were not in a position sooner to question its constitutionality or interpretation, the defenses now belatedly invoked by the City might conceivably be entertained. In contrast, the picture before us is one where the City, having voluntarily cooperated with the State in the drafting and promulgation of the very strategies now attacked by it, seeks in effect to renege on its own creation and commitment.

The architects of the Plan were not Congress or the EPA but the State and City of New York. Rather than permit

the EPA to draft and implement a plan, which would have occurred if the State had defaulted in doing so, the State and City long ago chose to exclude the EPA from the policy-making process and to draft the Plan themselves subject only to EPA review and approval. In clear and unmistakeable terms the Plan obligates them to carry out the very strategies which the City now contends that it cannot be ordered to enforce. Indeed, the Plan repeatedly refers to and lists the different State and City departments and agencies that are to implement these strategies, including

the borough governments, the Interstate Sanitation Commission, Port of New York Authority, Triborough Bridge and Tunnel Authority, New York State Thruway Authority, New York City Fire and Police Departments, New York City Hospital and Ambulance Operators, and Metropolitan Transportation Authority. Moreover, the record shows that the City's EPA Administrator was advised in September 1973 by one of the City's counsel that the Plan was enforceable against it.

There is no suggestion that upon the State's submission of the Plan to the Administrator of the EPA in 1973 for approval the City, if it had wished to avoid the obligations which it had voluntarily assumed as a subdivision of the State, could not have advised the Administrator that it had changed its mind and

did not propose to be responsible for carrying out the strategies which, according to the Plan, were to be implemented by it. Indeed, even after the approval of the Plan by the Administrator, the City could within 30 days have filed a petition for review, advancing its present contentions to the effect that the Plan, insofar as it provided for implementation of certain strategies by the City or its agencies, be revised or modified to relieve it of any obligation to enforce the Plan's strategies against others.

Had the City taken such action, the Administrator might well have disapproved the plan on the ground that its provisions for implementation and enforcement were illusory and therefore did not meet the criteria specified in § 110(a) (2) of the Act, 42 U.S.C. § 1857c-5(a) (2). If the

Administrator had nevertheless approved the Plan, the court upon a petition for review, would have been obligated to consider whether the Plan was, for the constitutional reasons now advanced by the City, unenforceable as written and decide whether the Administrator was required to approve it under § 110(a)(2). See Train v. Natural Resources Defense Council, 421 U.S. 60, 79 (1975); South Terminal Corp. v. EPA, 504 F. 2d 646, 676-80 (1st Cir. 1974). Had the Administrator disapproved the Plan or the court set aside his approval of it, the Administrator would then have had the opportunity to take appropriate action, including the promulgation of an EPA-formulated plan in lieu of the Plan here under consideration, which the EPA could then have enforced. At this date, almost

four years after the Administrator's approval of the Plan, to permit the City to renege upon its commitments would defeat the purpose of the Act, which is to protect the public health.

Since the City could have advanced its present contentions by way of a petition for review of the Administrator's approval of the Plan in 1973 and chose instead voluntarily to commit itself to enforcement of the Plan, we hold that the City has waived its right to assert these contentions and is precluded by § 307(b) (2) of the Act from raising them in an enforcement proceeding instituted under § 304. See Vargas v. Trainor, 508 F. 2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975) (waiver by state welfare official of state's Eleventh Amendment rights).

Our modification of our mandate to permit the City to raise constitutional issues was not designed to permit the City to attack the Plan on grounds which amount to an about-face of its own endorsement of the Plan and which could have been raised by it years ago.

Nor can the City at this late date escape the obligations voluntarily undertaken by it on the ground that the Plan failed to furnish adequate assurances that the State would have the necessary personnel and funding to carry out implementation. The State has not been heard to assert this or any other argument as a basis for invalidating the Plan. Nor has the State sought to avoid responsibility for its enforcement. On the contrary, it has acknowledged the enforceability of the Plan. See Friends II, supra, at 170,

179-80. We would not be justified, therefore, in assuming that the necessary legislative and budgetary steps will not be undertaken to carry out the Plan. Should the State conclude that the Plan should be revised, it may submit such revisions as are necessary to the Administrator for approval under § 110(a)(3) of the Act.

Even if we were to assume that the City had not waived the claims asserted by it upon remand and was not precluded by §307 from asserting them, we would be forced to conclude that the district court erred in holding that the State and its political subdivision, the City, were not obligated to enforce the Plan. The language of the Plan itself makes it clear beyond any reasonable doubt that

both the State and City represented that their responsible officials would carry out each of the detailed strategies outlined in the Plan, using the State and City personnel and facilities described in the Plan. Indeed the Plan, which was prepared by the New York State Department of Environmental Conservation with participation by New York City's Environmental Protection Administration, was submitted by the Governor of the State of New York to the EPA Administrator for approval.

In effect, the district court held that after a state, with the participation and cooperation of its political subdivision, drafts and submits to the EPA for approval an implementation plan (1) which complies with the criteria of § 110 of the Act, (2) which is approved by the Administrator as required by the Act,

see Union Electric Co. v. EPA, supra, (3) which has the effect of foreclosing formulation and imposition of a substitute federal plan, see Natural Resources Defense Council v. Train, supra, and (4) which is acknowledged by the state to be enforceable, the subdivision may nevertheless renege on enforcement of the Plan on the ground that it would prefer to use its scarce resources for other purposes despite a statutory scheme which contemplates mandatory enforcement. See Natural Resources Defense Council v. Train, supra. This decision is directly contrary to our holding that "acceptance by the EPA and judicial ratification by this court" resulted in the Plan becoming "binding upon and enforceable against state and local officials, subject only to the narrow revision and postponement provisions

allowed by the Act." We held that "Once a citizen suit to enforce an EPA-approved state implementation plan has been properly commenced, the district court is obligated . . . to issue appropriate orders for its enforcement."

The authorities relied upon by the district court as the basis for departure from our mandate, Brown v. EPA, supra, are clearly inapplicable to this case. In each of those cases, as well as in State of Maryland v. EPA, supra, and in State of Arizona v. EPA, supra, the EPA, a federal agency, sought to compel states or their political subdivisions to take steps (including appropriation of funds, adoption of legislation and use of state agencies and police) to implement and enforce a plan formulated by the EPA without any participation on the part

of the state or any authorization of or consent to implementation or enforcement by the state. The basic question raised by these decisions, as to which we intimate no view, was whether the federal government might, without violating the state's Tenth Amendment rights, impose upon a state government a series of federal policy decisions concerning control of transportation-related pollution, and through imposition of sanctions require the state to enact and enforce appropriate measures essential to carry out the federal plan. The courts in those cases interpreted the Act as not permitting such intrusion by the federal government into state sovereignty except to the extent that the pollution might be caused solely by a source or activity controlled by the state (e.g., state-owned vehicles or

incinerators) since the state otherwise might be deprived of control over the extent and manner in which their tax revenues could be spent and thus be turned into instruments for implementation of federally-dictated policies at variance with their own. All of this, it was indicated, might violate the states' Tenth Amendment rights or their right to a republican form of government. See Const. Art. IV, §4.

Although the district court here attempted to place the present case within the mold of Brown, District of Columbia and Train, the facts and the issues here are significantly different and clearly distinguishable. The most fundamental difference lies in the fact that, in contrast to those cases, the State here has clearly and unequivocally promulgated

its own pollution-control plan which represents its own policy decision, formulated through public notice by the State to its citizens and local governments, and through State-conducted public hearings.

The Plan was enacted in compliance with a statutory scheme which the State knew would result in federal approval so long as the State plan met the eight specified criteria, as well as foreclosing promulgation of a federal plan that would have been enforceable against polluters by the EPA or by citizens. The State thus entered into a pact based on cooperative federalism under which it made the essential policy choices and determined the procedures that should be adopted by it and its subdivisions to comply with federal pollution standards which Congress undisputably had the power to enact under the Commerce

Clause to protect the public health, since pollution is interstate in character and effect. Under this pact the State, as well as its subdivisions, became obligated to implement the Plan. In return, it received the assurance that the federal government would not substitute or administer its own plan. We find that this scheme does not impermissibly interfere with the governmental functions of the State or of its subordinate arm, the City.

The parties do not, and indeed cannot, dispute the fact that the Clean Air Amendments of 1970 regulate an area well within the federal government's plenary commerce power. Fry v. United States, 421 U.S. 542, 547 (1975); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The question, therefore, is whether this admittedly valid exercise

of the commerce power nonetheless impermissibly interferes with the integral governmental functions of a state and its local governments. In National League of Cities the Supreme Court held that the principles embodied in the Tenth Amendment limit federal power to the extent that

> "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner, ..." 44 U.S.L.W. at 4977.

Applying this basic principle, the Court held that the 1974 Amendments to the Fair Labor Standards Act, 29 U.S.C. §§201, et seq., which extended the coverage of its minimum wage and maximum hour provisions to almost all public employees of the states and local governments, transgressed the Tenth Amendment because the effects of

the amendments would be to increase state and local budgetary requirements very substantially, to curtail state and local policy initiatives, and to cause significant cutbacks in state and local training programs, as well as in local affirmative action employment and internship programs. The net result would be to interfere with the integral functions of these governments by altering or displacing their ability to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. Said the Court, "If Congress may withdraw from the States the authority to make those fundamental employment decisions . . . we think there would be little left of the States' 'separate and independent existence,'" 44 U.S.L.W. at 4979.

In determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we are therefore required to balance the reason for the exercise against the extent of usurpation of state policy-making or invasion of integral state functions that would result, giving "appropriate recognition to the legitimate concerns of each government." Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 304 (1942) (Murphy, J., dissenting). The present case presents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal

government. In formulating, proposing, and revising the Plan through public notice and public hearings, the State exercised its sovereign powers to make policy choices participated in by its citizens and its political subdivisions. Indeed, the State's freedom to choose and formulate its own policy concerning crucial local issues was preserved by and written directly into the Clean Air Act Amendments of 1970. As Justice Rhenquist noted in Train v. Natural Resources Defense Council, supra, 421 U.S. at 60:

> "Under §110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient standards, which also satisfies that section's general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of

a plan which satisfies the standards of §110(a)(2). . . ."
(Some emphasis supplied).

To the extent that the City claims that enforcement of the State-promulgated policies would displace City policy in allocating its resources, the State policy must prevail, since the City is but a creation and subdivision of the State and in this case participated in the State policy-making decisions.

The City's claim of federal interference with its police power, legislative and budgetary policies, and with other services wholly within its control, is neither substantial nor directed toward an integral governmental function. The City does not allege, for instance, that enforcement of the Plan will entail basic structural changes in police services or in any other traditional local service.

The impact of enforcement, to the contrary, can be expected merely to involve the use of existing structures and personnel to make changes in various traffic programs, licensing procedures, and parking, delivery and taxi regulations. The necessity of appropriating funds for the construction of toll facilities (from which it will receive revenue) or for the acquisition of private garages under the business-district parking reduction plan does not amount to the kind of injury found to be impermissible in National League of Cities, since the essential policy choices involved in creating the program were entirely within the control of the State and the participating City agencies, and not imposed by the federal government.

Moreover, the prospect that the City may be required to take action in the

area of transportation control cannot be considered an interference with an "integral" governmental program or service. The regulation of traffic on roads and highways, with its strong regional and interstate character (particularly in the New York City metropolitan area), has long been considered to be a cooperative effort between City, State and federal authorities, with no single entity being able to provide or impose a comprehensive traffic system, and with federal power, where necessary, taking precedence. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1972). Quite significantly, in National League of Cities v. Usery, supra, 44 U.S.L.W. at 4980 n.18, the Court reaffirmed the validity of United States v. California, 297 U.S. 175 (1936), on the grounds that a

state could be required to operate its railroad lines in conformity with federal regulations despite a claim of interference with state government. The Supreme Court distinguished United States v. California from National League of Cities on the ground that the operation of a railroad was not "an area that the States have regarded as integral parts of their governmental activities." The same can be said of the operation of streets and bridges so far as their impact on the national problem of air pollution is concerned.

The enforcement mechanism at issue in this case is, we believe, closer to the Economic Stabilization Act of 1970, upheld in Fry, et al. v. United States, 421 U.S. 542 (1975), and distinguished by the Court in National League of Cities,

which authorized the President to freeze the wages of state employees during a severe threat to the national economy. Reasoning that "effectiveness of federal action would have been drastically impaired" if state employees were excluded from the Act, the Supreme Court upheld the statute. In National League of Cities, the Court found Fry "quite consistent" with its holding because in Fry (as here) there was (1) a "serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall," (2) a carefully drafted program designed for very limited interference with states' freedom, and (3) a program that "displaced no state choices as to how governmental operations should be structured." 44 U.S.L.W. at 4979.

The facts here are analogous. The Clean Air Act Amendments of 1970 are directed toward a significant national health and safety program--air pollution--which respects no political boundaries. Residents in the vicinity of New York City, including some persons in New Jersey and Connecticut, are critically in need of a reduction in carbon monoxide pollution which was, at the time of this suit, five times the national health standard. The entire structure of the Clean Air Amendments was aimed at providing the states with primary responsibility for establishing policy and implementation procedures to meet the national goals in order to minimize federal intrusion. Federal imposition of policy upon the State never took place in this case, and would only have taken place under the Act if the State had refused to submit

its own Plan. In the context of the enforcement of the Plan through citizen suit, the choices and procedures are the products of State choice, not of federal policy, and may legitimately be enforced by the district court.[7]

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7 Our decision that the Plan is enforceable is not to be construed as relieving the EPA Administrator of his duty to provide, pursuant to our order in Friends I, supra, 499 F.2d at 1126, a statement of the available State, City and federal resources for implementation of the Plan. However, while the State and City have, in submitting the Plan to the EPA Administrator for approval in 1973, expresssed reservations about their capability of financing the costs of implementation and we are well aware of the current fiscal crisis in which the City finds itself, neither has stated that it must for financial reasons renege on the commitments made by it when the Plan was submitted to the EPA for approval in 1973. Nor have we been advised that the New York Legislature has refused to appropriate the funds needed to implement the Plan. The State's appropriation of adequate resources for the implementation of the Plan is therefore not an issue before us. On the contrary, as the record

For these reasons, we grant appellants' motion to vacate the decision of the district court dated July 13, 1976, and for a writ of mandamus, and remand the case to the district court with directions to reinstate its partial summary judgment entered on April 30, 1976, to the end that the pollution control strategies which were the subject of that judgment will be promptly implemented.

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stands the responsible chief executives of the State and City have indicated that while financing of the Plan would pose problems in policy choices concerning the allocation of resources, they would take the necessary steps to obtain the financial support required.

APPENDIX II

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of March, one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
Circuit Judges,

Friends of the Earth, et al.,
Plaintiffs-Appellants,
v.
Hugh Carey, et al., 75-7497
Defendants-Appellees, 76-3054
and
Russell Train,
Defendant.

Friends of the Earth, et al.,
Petitioners,
v.
Kevin T. Duffy, United States District Judge,
Respondent.

A petition for a rehearing having been filed herein by counsel for the City appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of March, one thousand nine hundred and seventy-seven.

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Friends of the Earth, et al.,
Plaintiffs-Appellants,
v.
Hugh Carey, et al., 75-7497,
Defendants-Appellees, 76-3054
and
Russell Train,
Defendant.

Friends of the Earth, et al.,
Petitioners,
v.
Kevin T. Duffy, United States District Judge,
Respondent.

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A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel

for the City appellees, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

APPENDIX III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Plaintiffs-Appellants,

-against-

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. CODD, ALFRED EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

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PARTIAL
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AND ORD

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This action came on for hearing before a panel of the Court of Appeals for the Second Circuit, with Honorable Walter R. Mansfield, William H. Timbers and Thomas J. Meskill, Circuit Court Judges sitting, and the issues with respect to partial judgment having been duly heard and a decision having been duly rendered on April 26, 1976, and there being no just reason for delay of the entry of this partial judgment, it is hereby

ORDERED, ADJUDGED and DECREED that partial judgment be entered immediately by the Clerk of the Court in favor of plaintiffs, Friends of the Earth, Friends of the Earth New York Branch, Natural Resources Defense Council, Inc., Sierra Club, Citizens for a Better New York, Citizens for Clean Air, Inc., Committee for Better Transit, Inc., Environmental Action Coalition, Inc., Harlem Valley

Transportation Association, Institute for Public Transportation, NYC Clean Air Campaign, New York State Transportation Council, North East Transportation Coalition, West Village Committee, David Sive and Paul Dubrul, and

(a) against defendants Hugh Carey, in his official capacity as Governor of the State of New York, Abraham Beame, in his official capacity as Mayor of the City of New York, Ogden Reid, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, Robert A. Low, in his official capacity as Administrator of New York City Environmental Protection Administration, State of New York, City of New York and Michael J. Codd, in his official capacity as

Commissioner of the New York City Police Department, Moses L. Kove, in his official capacity as Chairman of the Taxi and Limousine Commission and Theodore Karagheuzoff, in his official capacity as Commissioner of the New York City Department of Traffic, declaring and adjudging the said defendants in violation of the New York City Transportation Control Plan Strategy B-1C (partial ban on taxi cruising);

(b) against defendants Hugh Carey, Abraham Beame, Ogden Reid, Robert A. Low, State of New York, City of New York and Michael J. Codd, in their official capacities, Alfred Eisenpreis, in his official capacity as Administrator of the Economic

Development Administration, Elinor J. Guggenheimer, in her official capacity as Commissioner of the Department of Consumer Affairs, Alex Mautner, in his official capacity as Acting Administrator of the New York City Transportation Administration and Victor Marrero, in his official capacity as Chairman of the City Planning Commission, declaring and adjudging the said defendants in violation of the New York City Transportation Control Plan Strategy B-3 (reduction in Manhattan central business district parking);

(c) against defendants Hugh Carey, Abraham Beame, Ogden Reid, Robert A. Low, Theodore Karagheuzoff and Alex Mautner in their official

capacities and State of New York, City of New York declaring and adjudging the said defendants in violation of New York City Transportation Control Plan Strategy B-7 (imposition of tolls on all East and Harlem River Bridges); and

(d) against defendants Hugh Carey, Abraham Beame, Ogden Reid, Robert A. Low, Michael J. Codd, Alfred Eisenpreis, Alex Mautner and Victor Marrero, in their official capacities and the State of New York and City of New York declaring and adjudging the said defendants in violation of New York City Transportation Control Plan Strategy D-3 (after hours deliveries to stores and office buildings); and it is further,

ORDERED, ADJUDGED and DECREED that defendants Hugh Carey, Abraham Beame, State of New York and City of New York, implement and enforce the said four strategies, and to that end, it is further

ORDERED, ADJUDGED and DECREED, that the State of New York and Governor of the state of New York, Hugh Carey, submit to this Court within twenty (20) days of the entry of this judgment, a detailed time schedule for compliance by the defendants identified in subparagraphs (a) through (d) of the first decretal paragraph of this Judgment and Order with the four strategies listed above; [the four strategies collectively referred to as the "Strategies"]; and it is further

ORDERED, ADJUDGED and DECREED that the time schedules submitted in accordance with this judgment shall include the

following:

1) a statement of each milestone necessary to complete each strategy;

2) a precise statement as to the date by which each and every milestone shall be completed;

3) a statement setting forth with specificity each agency, department, municipal corporation, public authority or other state instrumentality, and the chief official of each such entity, which will be responsible for compliance with each and every milestone;

4) a schedule for serving periodic reports upon all parties to this action and the Federal Environmental Protection Agency setting forth the status of compliance with the milestones for each strategy;

and it is further

ORDERED, ADJUDGED and DECREED that the State of New York or the Governor of the State of New York has the primary responsibilty to fully implement and enforce the strategies, and no delegation of said responsibility in the New York City Transportation Control Plan shall relieve said defendants of said responsibility under this partial judgment; and it is further

ORDERED, ADJUDGED and DECREED that said primary responsibility of the State of New York or the Governor of the State of New York shall not relieve the City of New York or the Mayor of the City of New York or any instrumentality thereof of its responsibilities under this partial judgment; and it is further

ORDERED, ADJUDGED and DECREED that fifteen (15) days after service and filing

of the proposed schedule by the State of New York and the Governor of the State of New York, other parties may serve and file any objections they may have to the schedule or other documents submitted by the State of New York and the Governor of the State of New York, and that, upon such further deliberations as are necessary, such schedule, as may be amended by the Court, shall be incorporated in an order to be issued by the Court; and it is further

ORDERED, ADJUDGED and DECREED that this judgment and orders issued thereunder shall be without prejudice to the right of any party to seek further relief based upon the judgment and orders rendered or to be rendered in this cause whenever necessary or proper; and it is to be further

ORDERED, ADJUDGED and DECREED that the Court will retain jurisdiction of this action to assure compliance with this partial judgment and to consider an award of fees and costs pursuant to Section 304 of the Clean Air Act and rule 54 of the Federal Rules of Civil Procedure.

Dated: New York, New York
April 29, 1976

/s/ Kevin Thomas Duffy
United States District Judge

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRIENDS OF THE EARTH, et al.,

Plaintiffs,

-against-

HUGH L. CAREY, et al.,

Defendants.

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74 Civ. 4500 (KTD)

ORDER

This matter came on for hearing before Honorable Kevin T. Duffy, United States District Judge, for an order pursuant to and implementing the Partial Judgment and Order dated April 29, 1976 ("Judgment"), and the issues with respect thereto having been duly heard, and there being no just reason for delay of the entry of this order, it is hereby

ORDERED, ADJUDGED and DECREED that the State of New York and Governor of the State of New York, Hugh Carey, the City of New York and the Mayor of the City of New York,

Abraham Beame, and such delegates of the State and Governor as are specified pursuant to the Order, perform and comply with each and every requirement of the Schedules annexed hereto (hereinafter "Schedules"), and it is further

ORDERED, ADJUDGED and DECREED that within thirty (30) days of the entry of this order, the State of New York and the Governor of New York, Hugh Carey, shall serve and file with the court a statement setting forth with specificity each agency, department, municipal corporation, public authority or other state or city instrumentality, and the chief official of each such entity, which will be performing the work necessary to comply with each and every requirement of the Schedules, provided however that no such designation or delegation shall relieve the State of New York, City of New York, Governor of the State of New York or

the Mayor of the City of New York, from their responsibilities under the Judgment, Schedules or Transportation Control Plan as the case may be, and it is further

ORDERED, ADJUDGED and DECREED that in the event that a delegate or designated entity of the State of New York and the Governor of the State of New York fails to comply with any requirement of the Schedules, the State of New York and the Governor of the State of New York shall forthwith act to comply with the violated requirement, but such corrective action shall not relieve the defaulting delegate or designated entity of any and all liability for its default, and it is further

ORDERED, ADJUDGED and DECREED that all submissions, certifications and reports as required by the Schedules shall be contemporaneously served upon all parties in this action by service upon counsel of

record or other designated person, and it is further

ORDERED, ADJUDGED and DECREED that all provisions of the Judgment shall survive entry of this order and be of full force and effect.

Dated: New York, New York
February 18, 1977

United States District Judge

Strategy B-1c Partial Ban on Taxi Cruising

(A) The Governor, the Mayor, and any person to whom they delegate responsibilities in accordance with paragraph E of this Order, shall complete the following actions with regard to Strategy B-1c of the Transportation Control Plan on or before the dates specified:

(1) March 14, 1977:

(a) Submit to EPA data which describes daily vehicle-miles-traveled ("VMT") accumulated by taxis operating in the Mid-town Core Area on a typical weekday after June 30, 1975. The submission shall describe in detail the sources of information and the method used to calculate such data. Such data shall hereinafter be

referred to as "the base level."

(b) Submit to EPA a copy of and begin enforcing an adopted regulation which provides that between the hours of 8 a.m. and 7 p.m., inclusive, daily except Sundays, in the Midtown Core Area, passengers may be picked up or discharged by taxicabs only within 12 inches of the curb and parallel thereto except that no such pickup or discharge shall be made:

(i) within a pedestrian crosswalk;

(ii) within an intersection except on the side of a roadway opposite a street which intersects but does not cross such roadway;

(iii) along side or opposite any street excavation obstruction when stopping or standing would obstruct traffic;

(iv) along side a vehicle parked at the curb except where no unoccupied space is available within 100 feet; and

(v) under such condition as to obstruct the movement of traffic and in no instance so as to have less than ten feet available for the free movement or vehicular traffic

(c) Submit to EPA a plan, to be fully implemented by May 14, 1977 for a comprehensive public education and information program to inform

the public of the requirements of the regulation described in subparagraph (1)(b) above.

(d) Submit to EPA data which describes the amount of linear feet of curb space specifically dedicated to taxi queuing, discharge and pickup in the Mid-town Core Area as of June 30, 1975. This data shall hereinafter be referred to as "the start level."

(2) May 14, 1977:

(a) Submit to EPA a detailed plan describing specific taxi VMT reduction measures and the dates for their implementation. Such plan must demonstrate, by calculation, the anticipated reduction in taxi VMT to be

achieved and maintained in the Midtown Core Area. Such reduction shall be at least 5% from the base level by September 14, 1977, 10% from base level by February 14, 1978, and 20% from base level by February 14, 1979.

(b) Submit to EPA a detailed program plan for the establishment of at least 15,000 additional linear feet of dedicated curb space to be made available to taxis for queuing, discharge and pickup in the Midtown Core Area in addition to the start level amount referred to in paragraph (1)(d) above by November 14, 1977. Such program shall include plans for

a public education and information campaign to inform the public of the locations of such curb space and the placement of signs identifying all existing and new space. The selection of the locations for this space shall be supported on the basis of any or all of the following criteria:

(i) space/activity ratio;

(ii) space/land-use type ratio;

(iii) space/square footage of land area ratio;

(iv) space/employee ratio;

(v) space/generated taxi trips ratio; and

(vi) any other convenient measures.

(c) Submit to EPA a detailed plan for demonstration projects lasting at

least two months and to be completed by September 14, 1977 to effect a reduction in taxi VMT in the Midtown Core Area. Such plan shall include at least the following:

(i) A provision for group ridership between 7:00 a.m. and 7:00 p.m. covering:

(aa) specific hotel loading zones to Kennedy and LaGuardia Airports, and

(bb) Grand Central Terminal to the Lower Manhattan Financial District.

(ii) jitney service provided by taxicabs from 8:00 a.m. until 6:00 p.m., Monday through Friday, excluding legal holidays, along the following routes or their

equivalents:

(aa) 42nd Street at Grand Central Terminal, west to 7th Avenue, south to 33rd Street, west to 8th Avenue, north to 42nd Street, east to Vanderbilt Avenue, south to 42nd Street at Grand Central Terminal; and,

(bb) 42nd Street at Grand Central Terminal west to Madison Avenue, north to 57 Street, east to Lexington Avenue, south to 42nd Street, west to Grand Central Terminal.

(cc) routes defined by the City of New York between parking areas along the water-front of the Hudson and East Rivers and the Midtown and Downtown Core areas. These routes should be shown

to supplement, rather than compete with, existing public transit service.

(iii) a "Going My Way" busing system on routes found to have high incidence of single destination orientation among taxicab users;

(iv) a comprehensive public education and information campaign designed to make the public aware of the availability of the aforesaid programs.

(d) Certify to EPA that the plan required by subparagraph (1)(c) above has been fully implemented.

(3) July 14, 1977:

(a) Certify to EPA that, at a minimum, the demonstration projects described in subparagraphs (2)(c) above have

been implemented and are scheduled to be in operation until at least September 14, 1977. Include a detailed operational description of the projects and specify their duration. Within three months from each project's completion, submit to EPA a detailed, quantified evaluation of the impact of said project.

(4) September 14, 1977:

(a) Submit to EPA data which describes daily VMT accumulated by taxis operating in the Midtown Core Area on a typical weekday between June 1, 1977 and September 14, 1977.

(b) If the data required by subparagraph (4)(a) above demonstrates less than the requried 5%

reduction in VMT from the base level in the Midtown Core Area, submit to EPA a revision to the plan required under subparagraph (2)(a) above. Such revision shall include additional VMT reduction measures necessary to achieve and maintain the required 10% VMT reduction from the base level by February 14, 1978. If not already included in the plan submitted pursuant to subparagraph (2)(a) above, evaluate the following measures for inclusion in the revision and submit said evaluation to EPA:

(i) jitney service, at locations other than those required for demonstration;

(ii) group ridership from locations other than those required for demonstration.

(c) Certify to EPA that the measures scheduled for implementation by September 14, 1977 for the plan required by subparagraph (2)(a) above have been fully implemented.

(5) November 14, 1977:

Certify to EPA that plan required by subparagraph (2)(b) above has been fully implemented.

(6) February 14, 1978:

(a) Submit to EPA data which describes daily VMT accumulated

by taxis operating in the Midtown Core Area on a typical weekday between November 1, 1977 and February 14, 1978.

(b) Certify to EPA that there has been at least a 10% reduction in taxi VMT from the base level.

(c) Certify to EPA that the measures scheduled for implementation by February 14, 1978, for the plan required by subparagraph (2)(a) above have been fully implemented.

(7) February 14, 1979:

(a) Submit to EPA data which describes daily VMT accumulated by taxis operating in the Midtown Core Area on a typical weekday between November 1, 1978 and February 14, 1979.

(b) Certify to EPA that there has been at least a 20% reduction in taxi VMT from the base level.

(c) Certify to EPA that the measures scheduled for implementation by February 14, 1979, for the plan required by subparagraph (2)(a) above have been fully implemented.

(8) February 1, 1980 and annually thereafter:

Submit to EPA data which describes daily VMT accumulated by taxis operating in the Midtown Core Area on a typical weekday between November 1 and February 14 of the current year.

(B) The following definitions are applicable to terms used in paragraph (A) of this Order:

(1) Midtown Core Area: that area of Manhattan bounded by the south face of 34th Street, the north face of 59th Street, the east face of 3rd Avenue and the west face of 8th Avenue.

(2) Downtown Core Area: that area of Manhattan extending from the northern face of Canal Street to the extreme southern tip of Manhattan between the East and Hudson Rivers, inclusive of the areas projecting into the Rivers.

(3) Lower Manhattan Financial District: that area bounded by the south faces of Liberty Street and Fulton Street, the East and Hudson Rivers and the lower Hudson Bay.

(4) Jitney Service: the operation of vehicles usually smaller than standard buses (e.g., taxicabs, minibuses) along a fixed route where passengers may board and disembark at any point for a set fee. Descriptive information and signs to inform the public of the existence of such service must be provided along the entire route.

(5) Group Ridership: a single origin taxi trip allowing multiple-destination ridership confined to specific destination zones with a variable route permitted throughout the trip.

(6) "Going My Way" Busing System: the operation of a taxicab

or minibus with the destination visibly posted, such that passengers who are destined accordingly may be picked up at any point in the journey. The operation would require a flat fare, and would use either a fixed or flexible route.

(C) Where the dates set forth in paragraph (A) above require the submittal of substantive reports, plans or other information to EPA, the Governor or the Mayor shall also serve a copy of such documents upon the other parties to this action. After September 1, 1977, if they so choose, they may report the information required by this order on the "reporting date" next following the incremental dates set forth above. The reporting dates are established as the fifteenth of February,

April, June, August, October and December. The reporting dates established by this paragraph shall not be construed as altering in any way the dates set forth in paragraph (A) above for the completion of the actions therein established.

(D) The Governor or the Mayor shall immediately communicate in writing to the Court, EPA and the other parties to this action information relating to any conditions or circumstances which will or may render the State unable to comply in a timely manner with the scheduled actions set out in paragraph (A) above. The communication called for by this pargraph shall, wherever appropriate, be accompanied by:

(1) Copies of any correspondence between the State and any of its departments and any

contractors or suppliers having responsibilities in connection wih the scheduled actions mandated by this Order.

(2) Any other or additional documentation from which it may be inferred that any or all of the scheduled actions set out in paragraph (A) above will not or may not be accomplished by the dates specified.

(3) A discussion of any circumstances or conditions which will or may render compliance with future scheduled actions unachievable, together with steps the State has taken or will take to mitigate such circumstances or conditions.

Compliance with this paragraph shall neither constitute compliance nor excuse noncompliance with the requirements of the other paragraphs of this Order.

(E) The Governor or the Mayor may delegate any of the reporting or other requirements described hereinabove to such person or persons as they may deem appropriate, provided, however, that such delegation is certified in writing to EPA and the parties to this action.

(F) The terms of this Order will not have the effect of extending or altering in any way the date or dates fixed for compliance with any provisions of Title 40 of the Code of Federal Regulations other than those to which express reference is made in the terms of paragraph (A) above.

Strategy B-7 Imposition of Tolls on all East and Harlem River Bridges

(A) The Governor, through the Commissioner of the Department of Transportation and the Commissioner of the Department of Environmental Conservation, and any other person to whom he delegates responsibilities in accordance with paragraph D of this order, shall complete the following actions with regard to Strategy B-7 of the Transportation Control Plan on or before the dates specified:

(1) March 1, 1977:

Submit to EPA updated estimates from those presently existing of costs and revenues for the establishment of toll facilities on all presently untolled East and

Harlem River Bridges by
August 31, 1978.

(2) March 14, 1977:

(a) Certify to EPA the extent to which legal authority exists to establish tolls and to establish toll schedules that shall take into account:

(i) Time of use;

(ii) Day of use;

(iii) Vehicle type;

(iv) Vehicle occupancy; and

(v) Location of vehicle registration.

(b) Certify to EPA the extent to which legal authority exists to establish tolls which are, at a minimum, equal to tolls on presently tolled East and

Harlem River crossings.

(c) Submit to EPA a copy of the proposals necessary to obtain the authority required to establish tolls and toll schedules as described in subparagraphs (2)(a) and (2)(b) above and certify that these proposals have been submitted to the appropriate authorities.

(d) Certify to EPA that legal authority exists, or submit to EPA a copy of the proposals necessary to obtain legal authority, to assure that net revenues to be collected on presently untolled East and Harlem River Bridge crossings will

be used to subsidize or reduce mass transit fares or otherwise improve mass transit in the New York portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region.

(3) June 14, 1977:

Submit to EPA:

(a) A schedule for complete engineering, design and bid documents not to extend beyond November 14, 1977;

(b) A schedule for land acquisition, as necessary; and

(c) A study which identifies potential traffic disturbances or negative environmental impacts which may result from implementation of this Order and specifies

recommendations as to alternative traffic design arrangements to deal with any such disturbances or impacts.

(d) Certify to EPA that the necessary funds are available for construction and operation by August 31, 1978 of toll facilities on all untolled East and Harlem River Bridges.

(4) November 14, 1977:

(a) Certify to EPA that engineering, design and bid documents for all phases of toll facility construction have been completed; and

(b) Submit to EPA a schedule for construction of toll facilities not to extend beyond August 15, 1978.

(c) Certify to EPA that all legal authorities necessary to allow construction and operation of bridge toll facilities on all untolled East and Harlem River Bridges as described in sub-paragraphs (2)(a) and (2)(b) above have been obtained.

(d) Certify to EPA that all legal authorities necessary to assure that net revenues to be collected on presently untolled East and Harlem River Bridge crossings will be used for the purpose described in subparagraph (2)(d) above have been obtained obtained.

(5) August 31, 1978:

Establish tolls on all East and Harlem River Bridges which are, at

a minimum, equal to tolls on presently tolled East and Harlem River crossings and commence the allocation of net revenues collected to subsidize or reduce mass transit fares or otherwise improve mass transit in the New York portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region.

(6) March 14, 1979:

Submit to EPA an impact evaluation on the implementation of this Order and propose any changes in toll structure necessary to optimize traffic flow across the Bridges and minimize negative environmental impacts.

(B) Where the dates set forth in paragraph (A) above require the submittal of substantive reports, plans or other information

to EPA, the Governor or the Mayor shall also serve a copy of such documents upon the other parties to this action. After April 1, 1977, if they so choose, they may report the information required by this order on the "reporting date" next following the incremental dates set forth above. The reporting dates are established as the fifteenth of February, April, June, August, October and December. The reporting dates established by this paragraph shall not be construed as altering in any way the dates set forth in paragraph (A) above for the completion of the actions therein established.

(C) The Governor or the Mayor shall immediately communicate in writing to the Court, EPA and the other parties to this action information relating to any conditions or circumstances which will or

may render the State unable to comply in a timely manner with the scheduled actions set out in paragraph (A) above. The communication called for by this paragraph shall, wherever appropriate, be accompanied by:

(1) Copies of any correspondence between the State and any of its departments and any contractors or suppliers having responsibilities in connection with the scheduled actions mandated by this Order.

(2) Any other or additional documentation from which it may be inferred that any or all of the scheduled actions set out in paragraph (A) above will not or may not be

accomplished by the dates specified.

(3) A discussion of any circumstances or conditions which will or may render compliance with future scheduled actions unachievable, together with steps the State has taken or will take to mitigate such circumstances or conditions.

Compliance with this paragraph shall neither constitute compliance nor excuse non-compliance with the requirements of the other paragraphs of this Order.

(D) The Governor or the Mayor may delegate any of the reporting or other requirements described hereinabove to such person or persons as they may deem appropriate, provided, however, that such delegation is certified in writing

to EPA and the other parties to this action.

(E) The terms of this Order will not have the effect of extending or altering in any way the date or dates fixed for compliance with any provisions of Title 40 of the Code of Federal Regulations other than those to which express reference is made in the terms of paragraph (A) above.

Strategy D-3 After Hours Goods Delivery

(A) The Governor, the Mayor, and any person to whom they delegate responsibilities in accordance with paragraph D of this Order, shall complete the following actions with regard to Strategy D-3 of the Transportation Control Plan on or before the dates specified:

(1) March 14, 1977:

(a) Certify to EPA that a study or studies are underway which have as a goal the improvement of goods delivery through reorganization of truck activity which will impact significantly upon air pollution and traffic congestion in areas of Manhattan south of 60th Street.

(b) Submit to EPA the work schedules for the study or studies which are being conducted pursuant to the requirements of subparagraph (1)(a) above. Include within these schedules tasks that define specific actions to be studied and, where determined feasible, implemented either experimentally or on a permanent basis, with associated dates within which such implementation will occur. An implementation schedule should distinguish between short-term, mid-term or

long-term actions with discussions of intent, feasibililty and issues concerned with each proposal or recommendation.

(c) If the certification and the work schedule required by subparagraphs (1)(a) and (b) above cannot be submitted, submit documentation showing that applications have been made for studies to be undertaken as described above, or that studies for which applications are pending can be shown to include the goals described above. These studies should

include, at a minimum, the following:

(i) consolidation of goods delivery and pick-up on a location specific basis, either by block, building, or sector, as well as regionally;

(ii) street planning to ascertain the feasibility of allocating specific streets solely for truck activity which may require hand-trucking to adjacent blocks;

(iii) capacity limitations and traffic flow impacts associated with the diversion of

mixed traffic to alternate streets if certain streets are designated strictly for truck activities;

(iv) scheduling to render rush hour delivery or operation undesirable;

(v) an assessment of the economic impact on commercial establishments of after hour delivery of goods;

(vi) an intermodal freight study to determine if the establishment of new trailer-on-flatcar terminals east of the Hudson River in New

York City and Long Island will eliminate a significant amount of tractor trailer traffic through Manhattan.

This documentation must indicate demonstration projects, experiments, and tests which have resulted from the proposals and/or recommendations of past studies, and should outline conclusive results. Research in this area which has been performed elsewhere may be included, if such information is important to the requirements of this Order.

(2) June 14, 1977:

Submit to EPA detailed implementation schedules for at least two demonstration projects from among a list including, but not limited to:

(i) consolidation of goods delivery and pick-up on a location specific basis, either by block, building, or sector;

(ii) allocation of specific streets solely for truck activity, which may require hand-trucking to adjacent blocks;

(iii) limitation of capacity to impede flow of through vehicles on certain streets;

(iv) reservation of curb lanes for either through vehicles or buses to prohibit or impede curbside deliveries in selected areas at specific times, particularly those conflicting with rush hour commuting periods;

(v) building receiver scheduling to prohibit delivery operations conflicting with peak hour commuting periods;

(vi) the use of intermodal freight terminals to reduce the use of through trailer-truck

movement in Manhattan;

(vii) reservation of specific lanes for through trucks where this would improve average speed performance; and

(viii) reservation of specific avenues at specific times for truck movement only.

Such demonstrations must be initiated no later than September 1, 1977 and be conducted for a period of no less than three months. They may be phased if necessary for optimum performance. The implementation schedule must include a program for monitoring the 'before-and-after' effects of the experiment,

evaluating the impact of each demonstration on parameters such as air quality or pollutant emissions, traffic speeds, delays and waiting times, total distances traveled, and average loads per vehicle.

(3) August 14, 1977:

If the certification referred to in subparagraph (1)(a) above has not been made, submit to EPA signed contracts for studies described in subparagraph (1)(c) above together with work schedules as described in subparagraph (1)(b) above.

(4) September 1, 1977:

Certify that the demonstration projects required in paragraph (A)(2) have been commenced and

specify their duration.

(5) December 14, 1977:
Submit a written decision identifying those measures which will be implemented on a permanent basis with a detailed justification regarding any measure which is not selected for implementation on a permanent basis.

(6) December 14, 1977; and semi-annually thereafter:
Submit data and information which describe the progress and direction of the study referred to in subparagraph (1)(a) and (3) above, the impacts and results of the demonstration projects required by paragraph (2) above and progress being

made in implementing the measures arising from the study.

(B) Where the dates set forth in paragraph (A) above require the submittal of substantive reports, plans or other information to EPA, the Governor or the Mayor shall also serve a copy of such documents upon the other parties to this action. After April 1, 1977, if they so choose, they may report the information required by this Order on the "reporting date" next following the incremental dates set forth above. The reporting dates are established as the fifteenth of February, April, June, August, October and December. The reporting dates established by this paragraph shall not be construed as altering in any way the dates set forth in paragraph (A) above for the completion of

the actions therein established.

(C) The Governor or the Mayor shall immediately communicate in writing to the Court, EPA and the other parties to this action information relating to any conditions or circumstances which will or may render the State unable to comply in a timely manner with the scheduled actions set out in paragraph (A) above. The communication called for by this paragraph shall, wherever appropriate, be accompanied by:

(1) Copies of any correspondence between the State and any of its departments and any contractors or supplies having responsibilities in connection with the scheduled actions mandated by this Order.

(2) Any other or additional documentation from which it may be inferred that any or all of the scheduled actions set out in paragraph (A) above will not or may not be accomplished by the dates specified.

(3) A discussion of any circumstances or conditions which will or may render compliance with future scheduled actions unachievable, together with steps the State has taken or will make to mitigate such circumstances or conditions.

Compliance with this paragraph shall neither constitute compliance nor excuse noncompliance with the requirements of the other paragraphs of this Order.

(D) The Governor or the Mayor may delegate any of the reporting or other requirements described hereinabove to such person or persons as they may deem appropriate, provided, however, that such delegation is certified in writing to EPA and the other parties to this action.

(E) The terms of this Order will not have the effect of extending or altering in any way the date or dates fixed for compliance with any provisions of Title 40 of the Code of Federal Regulations other than those to which express reference is made in the terms of paragraph (A) above.

STRATEGY B-3 PARKING REDUCTION

(A) The Governor, the Mayor, and any person to whom they delegate responsibilities in accordance with paragraph (F) of this Order, shall complete the following actions with regard to Strategy B-3 of the Transportation Control Plan on or before the dates specified:

(1) April 1, 1977:

Submit to EPA an inventory of the quality, location and distribution of existing parking spaces as of any date between April 1, 1974 and February 30 [sic], 1977 ("inventory levels") for the locations specified, categorized and

classified in the following manner:

(a) on-street spaces; classified as metered, regulated (by type of restriction), and unregulated that are:

(i) in that area of Manhattan extending from the northern face of 59th Street to the southern face of 34th Street and from the western face of 8th Avenue to the eastern face of 3rd Avenue ("the Midtown Core"),

(ii) in that area of Manhattan extending from the northern face of Canal Street to the

extreme southern tip of Manhattan between the East and Hudson Rivers, inclusive of the areas projecting into the rivers ("the Downtown Core"), and

(iii) in the remaining area of Manhattan south of the northern face of 59th Street from the East River to the Hudson River and from the northern face of Canal Street to the northern face of 59th Street, excluding the Midtown Core ("the Peripheral Area").

The total area comprising the Midtown Core, the Downtown Core and the Peripheral Area is hereinafter referred to as "the Hub Area";

(b) Off-street parking spaces, classified as commercially available (parking spaces which are at any time available to the general public for a fee) and non-commercially available (all other off-street parking spaces), and further classified as garage or lot space, that are:

(i) in that area of Manhattan comprised of the Midtown Core;

(ii) in that area of Manhattan comprised of the Downtown

core; and

(iii) in that area of Manhattan comprised of the Peripheral Area.

(2) May 14, 1977:

(a) Submit to EPA detailed work programs to reduce and manage parking in the Midtown Core, the Downtown Core and the Peripheral Area. Such work programs shall describe specific measures to be implemented, shall specify dates for their implementation, and shall demonstrate by calculation that such measures are adequate to achieve and maintain a reduction of automobile entries into that

area of Manhattan south of 60th Street between the hours of 6:00 a.m. and 10:00 a.m. weekdays ("Rush Hour Auto Entries") by 5% by September 14, 1977, 10% by February 14, 1978, and 20% by February 14, 1979. Such programs shall include:

(i) For the Midtown Core:

(aa) A plan to eliminate all legal on-street parking spaces by June 14, 1977; such plan shall include a showing that necessary resources are available and committed to substantially eliminate

illegal on-street parking by January 14, 1978, including increases in automobile towing capacity to a level which in no event shall be less than removal of 500 automobiles per day from illegal spaces in the Midtown Core; (bb) legally enforceable requirements which provide that new commercially available parking spaces may be authorized for construction only on a one for two trade-in basis within the

Midtown Core, i.e., one new space may be authorized for construction if and only if two commercially available spaces have been removed from Midtown Core inventory levels;

(cc) legally enforceable requirements which limit the construction of new non-commercially available parking spaces so that they may be provided only on the basis of specific ratios. Such ratios shall apply to all types of non-commercially available parking spaces and shall be as strict or stricter than those provided

in the proposal entitled, "Regulation of Parking in Manhattan: Zoning Proposals," published December 6, 1974 by the City of New York and shall be submitted with the plans for comment by EPA and other parties to this action.

(ii) for the Downtown Core:

(aa) a plan to provide for a ban on general on-street auto parking between the hours of 8:00 a.m. and 6:00 p.m. by June 14, 1977 provided, however, that existing metered spaces may be used legally at times other than rush hours (7:00 a.m. to 10:00 a.m. and 4:00 p.m. to 7:00 p.m. on weekdays);

such a plan shall include a showing that necessary resources are available and committed to substantially eliminate illegal on-street parking by January 14, 1978, including an increase in automobile towing capability to a level which in no event shall be less than removal of 100 automobiles per day from illegal spaces in the Downtown Core;

(bb) legally enforceable requirements which provide that new commercially available parking spaces may be authorized for construction only on a one for two trade-in basis within the

Downtown Core, i.e., one new space may be authorized for construction if and only if two commercially available space have been removed from Downtown Core inventory levels;

(cc) legally enforceable requirements which limit the construciton of new non-commercially available parking space so that they may be provided only on the basis of the specific ratios established under subparagraph (2)(a)(i)(cc) above.

(iii) For the Peripheral Area:

(aa) a plan to provide for a ban on general

on-street auto parking between the hours of 8:00 a.m. and 6:00 p.m. on weekdays by August 31, 1977, provided, however, that parking may be allowed on specified streets which are primarily residential and are zoned as residential and provided further that existing metered spaces may be used legally at times other than rush hours (7:00 a.m. to 10:00 a.m. and 4:00 p.m. to 7:00 p.m. on weekdays); such plan shall include a

showing that the necessary resources are available and committed to substantially eliminate illegal on-street parking by January 14, 1978, including increases in automobile towing capability to a level which in no event shall be less than removal of 100 automobiles per day from illegal spaces in the Peripheral Area.

(bb) Legally enforceable requirements which provide that new commercially available parking spaces may be authorized for construction only on a one for one trade-in basis within the Peripheral

Area, i.e., one new space may be authorized for construction if and only if one commercially available space has been removed from Peripheral Area inventory levels.

(iv) Such other measures necessary to achieve the required reductions, such as:

(aa) parking surcharges;

(bb) late openings;

(cc) carpool rate reductions;

(dd) space capacity limitations by time of day; and

(ee) zoning bonuses for closings.

(b) Submit to EPA a detailed description of the system developed to account for

changes to the parking space inventory determined pursuant to subparagraph (1) above. Such system shall, as a minimum, include:

(i) an official log which provides an up-to-date summary of all parking spaces, both existing and authorized for establishment in the Hub Area, classified in such manner as to provide ready determination of compliance with this Order; and

(ii) procedures designed to assure that authorization to construct new parking spaces will not be granted contrary to the provisions of this Order.

(3) June 31, 1977:

Submit to EPA a detailed description of the system developed to account for reductions in Rush Hour Auto Entries. This system shall include a baseline level for Rush Hour Auto Entries on a typical weekday between January 1, 1975 and June 15, 1977, which baseline level shall be used in calculating reductions in Rush Hour Auto Entries in the following subparagraphs of this Order. Supporting information specifying the method by which this baseline level was obtained shall be included and the same type of information shall be used to

document all reports of reductions in Rush Hour Auto Entries in the following subparagraphs of this Order. The information base from which the baseline level is derived shall consist of comprehensive counts of automobiles entering the area of Manhattan south of 60th Street between the hours of 6:00 a.m. and 10:00 a.m. conducted in accordance with normal traffic count procedures on each weekday for a minimum of three consecutive weeks; provided that an alternate information base may be used if it is demonstrated to the satisfaction of EPA and the other parties to this action, prior

to April 1, 1977, that the alternate information base will result in data of accuracy equal to the data derivable from the three-week information base.

(4) July 14, 1977:

(a) Submit to EPA data identifying the total number of vehicle miles traveled (VMT) by automobiles in the 5 boroughs of New York City on a typical weekday between July 1, 1974 and June 31, 1977. Supporting information specifying the method by which these data were obtained must be submitted together with a demonstration that the range of error of the data is less than 2%.

(b) Submit to EPA a work program for a comprehensive study to be completed by February 30 [sic], 1978, to implement a city-wide parking policy and program complimenting the programs required by subparagraph (2)(a) above. The study at a minimum shall:

(i) further define the relationships among auto usage, parking, localized carbon monoxide concentrations, and hydrocarbon emissions in the Hub Area and in the remainder of New York City;

(ii) identify specific parking control or other measures to be implemented to accomplish the following objectives:

(aa) achieve by September 14, 1979 a reduction of 10% in automobile VMT from the level identified in sub-paragraph (4)(a) above; and

(bb) achieve a 35% reduction in Rush Hour Auto Entries by September 14, 1979 and a 50% reduction in Rush

Hour Auto Entries by September 14, 1980.

(c) Submit to EPA an evaluation of the following issues with identification of problems and recommendations for their solution:

(i) legal and illegal parking by privileged and governmental vehicles;

(ii) layover of express buses coming into Manhattan from outlying areas; and

(iii) the use of on-street parking spaces in the residential parts of the Peripheral Area for purposes other

than the storage of residents' automobiles.

(d) Submit to EPA a Parking Inventory Report for the accounting date of July 1, 1977. All Parking Inventory Reports under this Order shall include the following data for the Midtown Core, the Downtown Core, and Peripheral Area separately:

(i) the total number of on-street parking spaces which were eliminated from inventory levels as of the accounting date;

(ii) the total number of commercially available parking spaces eliminated from inventory

levels as of the accounting date;

(iii) the total number of commercially available and non-commercially available (by type) spaces authorized for construction (excluding those spaces for which authorization was issued and subsequently withdrawn) between the date used to determine inventory levels under subparagraph (1) above and the accounting date; and

(iv) numerical estimates of the extent of illegal

on-street parking on a typical weekday within two weeks of the accounting date, together with a specification of the methodology used in making these estimates.

(5) September 14, 1977:

(a) Certify to EPA that:

(i) at least a 5% reduction of Rush Hour Auto Entries has been achieved;

(ii) legal on-street parking spaces in the Hub Area have been eliminated to the extent required by subparagraphs (2)(a)(i)(aa), (2)(a)(ii)(aa),

and (2)(a)(iii)(aa)above.

(b) Submit to EPA a Parking Inventory Report for the accounting date of September 1, 1977.

(6) January 14, 1978:

Certify to EPA and provide documentary evidence that illegal on-street parking has been substantially eliminated in the Hub Area and the plans established under subparagraphs (2)(a)(i)(aa), (2)(a)(ii)(aa), and (2)(a)(iii)(aa) above to substantially eliminate illegal on-street parking in the Hub Area have been fully implemented.

(7) February 14, 1978:

(a) Certify to EPA that at least

a 10% reduction in Rush Hour Auto Entries has been achieved.

(b) Submit to EPA a Parking Inventory Report for the accounting date of February 1, 1978.

(8) February 30 [sic],1978:

(a) Submit to EPA the final report for the City-wide parking policy study required by subparagraph (4)(b) above. Identify to what extent auto usage must be further reduced to provide for accomplishment of the objectives established by subparagraph (4)(b)(ii) above; specify those measures to be imple-

mented to accomplish said objectives by proposed dates no later than the dates therein specified; specify implementation dates for each such measure; and specify those administrative and enforcement procedures to be used in implementing said measures.

(b) Submit to EPA detailed work programs identifying specific measures to be implemented to carry out by February 14, 1979 recommendations required by subparagraph (4)(c) above; specify implementation dates

for each measure.

(9) February 14, 1979:

(a) Certify to EPA that at least a 20% reduction in Rush Hour Auto Entries has been achieved.

(b) Certify to EPA that all measures identified under subparagraph (8)(b) have been fully implemented.

(c) Submit to EPA a Parking Inventory Report for the accounting date of February 1, 1979.

(10) September 15, 1979:

(a) Certify to EPA that all measures required to be completed by September 14, 1979 as detailed in the final report submitted

pursuant to subparagraph (8)(a) above have been fully implemented;

(b) Certify to EPA that at least a 35% reduction in Rush Hour Auto Entries has been achieved.

(11) February 15, 1980 and annually thereafter:

Submit to EPA a Parking Inventory Report for the accounting date of June 1.

(12) September 15, 1980:

(a) Certify to EPA that all measures required to be completed by September 14, 1980 as detailed in the final report submitted pursuant to subparagraph (8)(a) above have been

fully implemented;

(b) Certify to EPA that at least a 50% reduction in Rush Hour Auto Entries has been achieved.

(B) On and after May 14, 1977, neither the Governor, Mayor nor any persons under their control shall permit the construction or operation of any new parking space except in accordance with the ratios specified in subparagraph A(2)(a) of this Order.

(C) Nothing in this Order shall be construed to permit the construction or operation of any parking space in a manner inconsistent with the requirement of the New York regulations pertaining to

Indirect Sources (6 N.Y.C.R. Rpt. 203).

(D) Where the dates set forth in paragraph (A) above require the submittal of substantive reports, plans or other information to EPA, the Governor or the Mayor shall also serve a copy of such documents upon the other parties to this action. After October 1, 1977, if they so choose, they may report the information required by this Order issued on the "reporting date" next following the incremental dates set forth above. The reporting dates are established as the fifteenth of February, April, June, August, October, and December. The reporting dates established by this paragraph shall not be construed as altering in any way the dates set forth in paragraph (A) above for the completion of the actions therein established.

(E) The Governor, Mayor, and any person to whom they delegate responsibilities in accordance with paragraph (F) of this Order shall immediately communicate in writing to the Court, EPA and other parties to this action information relating to any conditions or circumstances which will or may render the State unable to comply in a timely manner with the scheduled actions set out in paragraph (A) above. The communication called for by this paragraph shall, wherever appropriate, be accompanied by:

(1) Copies of any correspondence between the State and any of its departments and any contractors or suppliers having responsibilities in connection with the scheduled actions

mandated by this Order.

(2) Any other or additional documentation from which it may be inferred that any or all of the scheduled actions set out in paragraph (A) above will not or may not be accomplished by the dates specified.

(3) A discussion of any circumstances or conditions which will or may render compliance with future scheduled actions unachievable, together with steps the State has taken or will take to mitigate such circumstances or conditions.

Compliance with this paragraph shall not constitute compliance nor excuse non-compliance with the requirements of the other paragraphs of this Order.

(F) The Governor and Mayor may delegate any of the reporting or other requirements described hereinabove to such person or persons as they may deem appropriate provided, however, that such delegation is certified in writing to EPA and the other parties to this action.

The terms of the Order will not have the effect of extending or altering in any way the date or dates fixed for compliance with any provisions of Title 40 of the Code of Federal Regulations other than those to which express reference is made in the terms of paragraph (A) above.

Supreme Court, U. S.
FILED
AUG 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1718, 76-1737

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

HUGH L. CAREY, JAMES MELTON, PETER A. A. BERLE and THE STATE OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, et al.,

Respondents.

ANSWER TO PETITIONS OF ABRAHAM BEAME, et al., and HUGH L. CAREY, et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSS SANDLER and DAVID SCHOENBROD
Attorneys for Respondents
(Natural Resources Defense Council, Inc.)
15 West 44th Street
New York, New York 10036
(212) 869-0150

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IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1718, 76-1737

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, GOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

HUGH L. CAREY, JAMES MELTON, PETER A. A. BERLE and THE STATE OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, et al.,

Respondents.

ANSWER TO PETITIONS OF ABRAHAM BEAME, et al., and HUGH L. CAREY, et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

The petitioners seek to overturn a decision under the Clean Air Act that compels Hugh L. Carey, et al., (hereinafter the "State") and Abraham Beame, et al., (hereinafter the "City") to implement strategies contained in a Plan prepared by State and City agencies and submitted by the State's and City's highest officials to EPA with full knowledge that under the Clean Air Act EPA's approval would impose binding federal obligations. The thrust of the State's and City's claim is that the Clean Air Act prevented them from raising valid Constitutional arguments and that they are therefore deprived of sovereignty rights guaranteed by the Constitution. The record of the case is to the contrary. The petitioners ignore or mistake entire portions of the record and lower court decisions, including holdings that procedural requirements were fair as applied in this case, that they have had ample opportunity to present their case in a timely fashion, that they have taken inconsistent positions over a period of years, and that they have failed to seek available administrative remedies.

The instant case and its related cases have resulted in seven written opinions in the lower courts. The decisions in chronological order are as follows:

Friends of the Earth v. *EPA*, 499 F.2d 1118 (2d Cir. 1974) (Ratification of EPA approval of the New York State Transportation Control Plan (hereinafter "Plan") on petition for review pursuant to Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1)) (hereinafter *"Friends I"*). This petition for review was a separate proceeding and should not be confused with the instant case, which is a citizen suit enforcement action pursuant to Section 304, 42 U.S.C. § 1857h-2. *Friends I*, 499 F.2d at 1128.

Friends of the Earth v. *Wilson*, 389 F. Supp. 1394 (S.D.N.Y. 1974) (Citizen suit pursuant to Section 304,

42 U.S.C. § 1857h-2; first decision in this case—denial of preliminary injunction).

Friends of the Earth v. *Carey*, 401 F. Supp. 1386 (S.D.N.Y. 1975) (Second denial of preliminary injunction and denial of summary judgment).

Friends of the Earth v. *Carey*, 535 F.2d 165 (2d Cir. 1976) (Reversal of the two District Court decisions and direction that the City and State officials implement the Plan forthwith based upon construction of the Clean Air Act) (hereinafter *"Friends II"*).

Friends of the Earth v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976) (Limitation of enforcement of the Plan on remand from *Friends II* because of constitutional considerations).

Friends of the Earth v. *Carey*, 552 F.2d 25 (2d Cir. 1977) (Reversal of the District Court's constitutional decision and issuance of writ of mandamus directing prompt enforcement of the Plan) (hereinafter *"Friends III"*).

Friends of the Earth v. *Carey*, — F. Supp. — (S.D.N.Y. July 5, 1977) (Decision annexed hereto as Appendix I) (Denial of City's motion to suspend for six months or to eliminate the parking and bridge toll portions of the District Court's order of February 22, 1977 (City Pet.* App. IV) on the grounds that the City was in violation of procedural requirements of the order, had alleged nothing not known to it as early as 1973, had bypassed administrative remedies provided by the statute and had already litigated its legal claims).

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* References to "City Pet." and "State Pet." are to the respective City and State petitions for writs of certiorari.

These decisions have stated, restated and settled the relevant facts. The facts and holdings essential for this petition are as follows.

1. The substantive requirements of the Plan were without exception the State's and City's choices

The Clean Air Act compelled the states to attain air quality of specified standards and to do so within a specified period of time. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64-65 (1975). Each state was to prepare and adopt a plan of its own design meeting Clean Air Act criteria, § 110(a), 42 U.S.C. § 1857c-5(a), or, should it fail, or refuse to do so, the federal EPA was to promulgate its own Plan. § 110(c), 42 U.S.C. § 1857c-5(c). Here the State and City prepared and, after public hearings, adopted their own Plan with respect to transportation controls for the Metropolitan New York Region.

By drafting and adopting its own Plan, the State and City obtained substantial benefits under the Clean Air Act. EPA was required to accept the policy choices of the State and City and could not substitute its policy choices for those in the Plan. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80. Had the State and City not committed themselves to implement the strategies contained in the Plan, the Administrator would have had to disapprove the Plan as being only illusory. *Friends III*, 552 F.2d at 35. The State and City were able to make choices within the context of their own political, social and economic viewpoint. This latter benefit was particularly important and was emphasized by the New York Attorney General in defending the Plan and the Administrator's approval of it in *Friends I*. (Brief of the New York State Attorney General submitted in *Friends I* on behalf of the Governor of the State of New York, at p. 3).

Based upon this record the Court of Appeals found that "[t]he architects of the Plan were not Congress or the EPA but the State and the City of New York." *Friends III*, 552 F.2d at 34. The City did not and could not claim that it was unaware of the "scope, terms and reach of the Plan or of the scheme for its enforcement," such that it could not sooner question the Plan's constitutionality or interpretation. The Court ruled that the record established that the "City, having voluntarily cooperated with the State in the drafting and promulgation of the very strategies now attacked by it, seeks in effect to renege on its own creation and commitment." *Friends III*, 552 F.2d at 34.

2. The State consistently supported the enforceability of the Plan

The State did more than merely approve the Plan and submit it for approval to the Administrator. The State by the Attorney General defended the Plan in the Court of Appeals when the legality of the Administrator's approval was challenged. *Friends I*. Later, when plaintiffs first sought a preliminary injunction, the Assistant Attorney General informed the District Court Judge that the Plan "is a legally enforceable plan, is a legally adequate plan and that the state is committed . . . to fulfilling its responsibilities thereunder." Although he informed the Judge that the state would not implement certain strategies, he admitted that "If there is a valid legal ground for such a refusal, we have not been able to find it, your honor." *Friends of the Earth* v. *Wilson*, 389 F. Supp. at 1395, quoted in *Friends II*, 535 F.2d at 170. When the plaintiffs appealed the District Court's second refusal to require implementation of the Plan, the State declined to file a brief or participate in oral argument. *Friends II*, 535 F.2d at 168 n.1. After *Friends II* upheld

the enforceability of the Plan under the statute and was remanded for District Court enforecement, the State in May 1976 filed proposed orders and stated that the State would follow the Clean Air Act provisions by compliance with either the 1973 Plan or a revised Plan. (Aff. of Assistant Attorney General Paul S. Shemin, May 19, 1976 at ¶¶ 5, 7). In June 1976, the State did not join the City's motion challenging the constitutionality of enforcement. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976). Finally, in January 1977, as the Second Circuit noted in the opinion rejecting the City's constitutional claim, the State again did not file a brief. *Friends III*, 552 F.2d at 33. In the four years since April 1973, the State has either supported the enforceability of the 1973 Plan or refused to participate in the City's challenges to the Plan. Only with the instant petition for certiorari has the State reversed its position and, for the first time, attacked its own approval and submission of the Plan. Thus over a four-year period, which saw seven court decisions and the administrations of three different Governors, the State has stood by its own Plan.

3. The City did not challenge the Plan until more than two years after the Plan's approval

The City was a full partner in the preparation of the Plan and allowed the State to submit the Plan to EPA on its behalf. *Friends III*, 552 F.2d at 30 n.3. The City had knowledge that the Plan was enforceable nine months before *Friends I* was decided. A memorandum to Administrator Low's immediate predecessor dated September 11, 1973 discussed precisely the legal enforceability of the Plan. (Plaintiffs' Ex. E41-45; cited in *Friends III*, 552 F.2d at 34-35). The City, however, did not participate in *Friends I*. Instead the City allowed the State to

argue in support of the legality of the Plan's approval. As a result, *Friends I* explicitly held that the Plan was enforceable. In particular, the panel specifically mentioned the potential of enforced reduction of parking on the City streets as available to citizens should the City or State fail to carry out its duties under the Plan. *Friends I*, 499 F.2d at 1124.

There was no petition for certiorari from *Friends I*, and the City did not seek to intervene or otherwise attack the holding of *Friends I*.

When plaintiffs first sought enforcement of the Plan in October 1974, the City requested only that the District Court Judge withhold enforcement pending completion of the State's and City's attempt to revise the Plan pursuant to the administrative procedures of the Clean Air Act. *Friends of the Earth* v. *Wilson*, 389 F. Supp. at 1395. Not until September 22, 1975, did the City first allege that enforcement of the Plan might violate the Constitution. Thus over a period of two and one half years, which saw three court decisions and the administrations of two mayors, the City sat on its rights which it now says it was prevented from asserting.

4. The State and City have not petitioned for administrative remedies provided by the Clean Air Act

The Clean Air Act expressly provided several avenues of administrative relief from Plan strategies. *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976). The State and City have never sought an administrative remedy.

The State and City might have sought a postponement pursuant to Section 110(f), 42 U.S.C. §1857c-5(f). They did not.

The State and City might have revised the Plan pursuant to Section 110(a)(3)(A), 42 U.S.C. §1857c-5(a)(3)(A). EPA is "required" to approve a revision so long as the ultimate effects of the State's choice of emission limitations will produce compliance with the national standards. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80. The State and City have at every stage of the litigation announced their intent to revise the Plan, but have never formally proposed a revision. The District Court deferred enforcement pending revision in *Friends of the Earth* v. *Wilson*, *supra*, but that promised revision has not been submitted to EPA to this day.

The State and City might have obtained an acceptable administrative order by conference pursuant to Section 113, 42 U.S.C. §1857c-8. In July 1976, when plaintiffs made their second request for a preliminary injunction, the State and City responded that they had been meeting with EPA for eight months in a Section 113 conference in hopes that an agreement could be worked out. The District Court in part denied the preliminary injunction on that basis. *Friends of the Earth* v. *Carey*, 401 F. Supp. at 1390; *Friends II*, 535 F.2d at 173, 178-79. But these negotiations ended in failure because the State and City refused to consent to any orders related to the four main strategies of the Plan. In mid-September, 1976, EPA unilaterally issued administrative orders against the State and City. These administrative orders subsequently became the models for the District Court order. Although these orders substantially diluted and lengthened the deadlines of the Plan, the State and City made no attempt to comply.

5. The District Court order of February 22, 1977 is in conformity with the Plan and has not been challenged

The City has annexed to its petition the District Court order of February 22, 1977, which was signed *after* the

decision in *Friends III*. (City Pet. App. IV). The City then accuses the District Court in the context of this petition from *Friends III* of ordering harsh requirements which jeopardize the existence of the City of New York, (City Pet. 14-19). The order, however, conforms precisely with the State and City Plan and neither the State nor City have challenged the terms of the order as being inconsistent with the State and City Plan.

On remand from *Friends II* in April, 1976, the District Court sought proposed orders. EPA and plaintiffs jointly submitted orders which EPA certified as being in conformity with the 1973 Plan. The State did not argue to the contrary and the City made only a few technical comments. The City did not propose a counter order although a time period was provided to do so. The District Court, however, did not issue an order in 1976, but instead issued its decision questioning the constitutionality of enforcement. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976). After that decision was reversed in *Friends III*, and, on remand, on January 28, 1977, the District Court again asked for comment on the form of the proposed order. On this occasion the City did not object to the form of the order and agreed that the order could be entered as previously submitted by plaintiffs and EPA. *Friends of the Earth* v. *Carey* (July 5, 1977) (Appendix I at 6a-7a). The State and City did not appeal from the order of February 22, 1977.

As a result, while the City now repeatedly characterizes the order as being excessive, harsh and unrealistic, it did not propose a counter order, or challenge the order as issued. Thus the City lacks legal or factual basis to initiate a challenge to the content or form of the order for the first time in this Court on an appeal from *Friends III*.

The record concerning these orders, which is not before this Court and not fully developed, undercuts the

City's allegations concerning the orders. First, while the City claims the order forces the 50% reduction in parking, and while the Plan does contain such a strategy, the District Court in its order allowed up to three years to complete the 50% goal on the understanding that the period was sufficiently long to allow time for a revision on the Plan.

With respect to the City claim that the order eliminates "all" on-street parking, the District Court ruled on July 5, 1977 during oral argument that the City's interpretation of the order contradicted the City's own prior interpretation as well as the Court's understanding based upon the 1973 Plan. Judge Duffy promptly amended the order to undo the confusion which he found was caused by the City's violation of the order's procedural requirements. *Friends of the Earth* v. *Carey*, Appendix I at 13a. (It should be noted that most on-street parking in the relevant areas has been illegal for years).

Finally, as to bridge tolls, the Court order requires that the net revenue (estimated at $140 million) be used for mass transit subsidies. (City Pet. App. IV at 106-07). Bridge tolls for such purposes are not without official support. *United States Trust Co.* v. *New Jersey*, 97 S. Ct. 1505 (1977). With respect to this Plan, however, both houses of Congress, with the support of plaintiffs, have passed bills amending the Clean Air Act which will permit the Governor to eliminate the bridge toll requirement from the Plan if coupled with a commitment to prepare within a year a plan for financing mass transit. The bills are likely to become law, holding the possibility that the bridge tolls strategy will soon be eliminated.

The economic allegations of the City are likewise presented for the first time in this Court. The City complains that the Court of Appeals in *Friends III* did not consider the economic impact of the decision. (City Pet.

15-16). But, as the Court of Appeals noted, the City did not claim that for financial reasons it could not comply. *Friends III*, 552 F.2d at 39 n.7. After filing its petition for certiorari in this Court, however, the City moved to suspend or eliminate the parking and bridge toll portions of the February 22, 1977 order based upon broad, nonspecific economic grounds pursuant to Rule 60(b)(6), Fed. R. Civ. P. That motion was denied because the economic claims of the City were alleged too late for a Rule 60(b)(6) motion and because the City had administrative remedies. *Friends of the Earth* v. *Carey*, Appendix I at 8a-10a. The District Court's denial of that motion has been appealed by notice of appeal filed on July 8, 1977. But the Court of Appeals did not before, and this Court does not now have, any record to support the economic harms alleged in the petition for certiorari.

Because there is no record on the City's economic claims, the Court is at sea with respect to the actual economic effects of the Plan. First, the City's extravagant allegations of economic harm are suspect because the City never balances economic benefits of the Plan against costs of implementation and because it never specifies which aspects of the Plan are the cause of excessive harm. This in part follows from the fact that the thrust of the City's allegations is against the ultimate goals and of the Plan strategies, not against the specifics of the Court order.

Secondly, air pollution inflicts enormous economic costs. The Council on Environmental Quality reported that New York City's carbon monoxide problem was uniquely severe. (Council on Environmental Quality, *Seventh Annual Report* 213 (1976).) The City's own monitoring stations show that the eight hour national health standard is violated in midtown Manhattan every day that it is tested. Businesses leaving Manhattan prominently mention air pollution, congestion and poor mass transit as a cause for their leaving, and tourists complain

of and stay away for the same reasons. Studies show that vehicles on New York City streets move more slowly than they do on the streets of any other major United States city, and that, as a result, the cost of moving goods is higher. The New York Regional Plan Association has supported the court order, declaring that the order's requirement to reduce illegal and legal on-street parking in Midtown Manhattan would improve business rather than hurt it. The Regional Plan Association pointed out that if there were a total ban on automobile parking on Midtown Streets during business hours, only 10,000 out of the 3,000,000 people coming into Midtown would be inconvenienced while the rest would benefit.

Had the State and City raised their economic claim below, these issues could have been sorted out. Instead, the Court is presented with unsupported assertions and generalizations which will have to be briefed for the first time in this Court.

6. The State and City arguments confuse issues settled in prior litigation with those issues now appealable

The State and City say that the Plan's adoption by the State and submission to EPA was defective. But the manner of adoption and legality of the Plan was settled in *Friends I*. In that case Friends of the Earth and other petitioners questioned the adequacy of legal authority underlying the strategies of the Plan. The State supported the adequacy of the Plan. The Court of Appeals rejected the petition, holding that EPA properly approved the State's Plan. As the later panel summarized the holding of *Friends I*,

> "with the acceptance by the EPA and judicial ratification by this court, the Plan became binding upon and enforceable against state and local officials, subject only to the narrow revision and postponement provisions allowed by the Act." *Friends II*, 535 F.2d at 170.

It is important to note that *Friends I* is not the same case as this case. It was a Section 307(a) petition and neither the State nor the City, nor anyone else, filed a petition of certiorari.

Now in this Court, in the context of a defense to an enforcement action pursuant to Section 304 of the Clean Air Act, the State and City attempt to base their constitutional claim on a conclusion contrary to that reached in *Friends I*. To reopen that conclusion, however, raises problems of res judicata, collateral estoppel and the jurisdiction of this Court. But instead of dealing with the fundamental problems of attacking the holding of *Friends I* at this late stage, the State and City attack Section 307, by pretending that Section 307 took away their substantive rights. But Section 307 is only a procedural statute setting forth when questions related to the adoption of the Plan can be raised. The essential fact for this petition is that when *Friends I* was briefed, argued and decided, the State and City supported the legality of the adoption and submission of the Plan. *Friends III*, 552 F.2d at 34-35. The State and City thus rewrite history when they make the major premise of their constitutional claim the assertion that the Plan was adopted in an ultra vires or unlawful manner by the Governor and Mayor. Any constitutional argument must begin with conclusions of law as settled by *Friends I;* not with major premises and assertions to the contrary.

ARGUMENT

POINT I

The Petition By The State Was Not Timely Filed.

The State's petition for certiorari was filed after the passage of 90 days. 28 U.S.C. §2101(c). Ninety days from March 4, 1977, the day the Court of Appeals denied the City's motion for rehearing en banc, expired on June 2. The State's petition was not filed until June 6. The State has therefore failed to properly invoke this Court's jurisdiction. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

POINT II

The State and City, in order to make their petitions appear significant and of Constitutional dimension, make three misstatements. The record, to the contrary of the State and City allegations, shows that:

(1) The State and City were not prevented from raising their constitutional claim by the statutory scheme;

(2) The State and City, although they assert that they have a valid constitutional claim, do not make a constitutional argument under the relevant cases; and

(3) The State and City assert that they have been harmed because they are locked in, but the record shows that they have failed to seek available administrative relief.

The heart of the City and State petition for certiorari are the assertions that they have been prevented by Section 307 of the Clean Air Act from raising a valid

constitutional defense to the enforcement of the Plan, with the result that they have become unconstitutionally locked into decisions made four years earlier. The assertions are factually and legally false.

The first misstatement is the State's and City's claim that they have been prevented from raising their claim by Section 307 of the Clean Air Act.* The Clean Air Act expressly provided a procedure to raise all claims against the legality of a Plan—a petition for review pursuant to Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1). There was such a petition over the New York Plan, and the State participated. The State took the position that the Plan, which it and the City developed, approved and submitted to EPA, had been lawfully approved by EPA. *Friends I.* The State and City therefore are off on the wrong foot when they commence their claim by charging

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* Additional matters are obliquely suggested by the City Petition, but not spelled out. The City implies that the Court of Appeals precluded them from making their constitutional claim in a more timely fashion. (City Pet. 11). That is false. No one prevented the City from appearing in *Friends I*, and the City, for reasons which it has never explained, elected not to argue the constitutional claim in *Friends II* although it had earlier in September 1975 submitted a full constitutional argument in the District Court as a motion to dismiss. Its co-appellee, the City Transit Authority, did make the constitutional argument in *Friends II* based upon the then current Court of Appeals' decisions in *EPA* v. *Brown*, 97 S. Ct. 1635 (1977) and its companion cases, and plaintiffs responded. It was perhaps because the City had elected not to make its constitutional argument that the Court of Appeals refused to rehear the completed appeal, but required that the City make its constitutional argument as a motion to vacate. *Friends III*, 552 F.2d at 28-29. The City also mentions the absence of oral argument in *Friends III* and the fact that *Friends II* and *III* were decided by the same panel. But *Friends III* decided plaintiffs' motions to recall the mandate of the *Friends II* panel and was not a direct appeal. Oral argument takes place on such motions only where requested and the City did not request to be heard orally.

that it was the statutory scheme of the Clean Air Act that prevented them from making their constitutional claim. It was because of that fact that the Court of Appeals in *Friends III* held that the City had both waived its right to assert contrary contentions and was precluded by Section 307(b)(2) of the Clean Air Act from raising them in an enforcement proceeding. *Friends III*, 552 F.2d at 35, citing *Vargas* v. *Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975).

In their second misstatement, the State and City assert that what they have been prevented from raising is a valid constitutional argument, i.e., that enforcement of the Plan violates the Tenth Amendment. To make such an argument, however, the City and State must attack the holding of *Friends III* rejecting the City's substantive constitutional argument under the test of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). *Friends III*, 552 F.2d at 37-39. But neither the State nor the City suggests that the Court of Appeals erred in its analysis of the holding of *Usery*. This omission is fatal.

This startling omission reduces the petitions for certiorari to an absurdity. The State and City argue that theirs is a constitutional claim, but do not argue that the Court of Appeals erred in its substantive constitutional decision. *Usery* is virtually ignored, being cited only in passing. (City Pet. 22; State Pet. 8). It is not clear why this happened. In the City's brief to the Court of Appeals below, *Usery* was their primary reliance, being cited twenty times in their brief. (The State, of course, filed no brief.)

The constitutional argument which the City does make, is, in any event, patently incorrect. The City's argument proceeds upon the false assumption that the Clean Air Act does, in fact, regulate state processes. The City

then states a flat rule that no federal law can create a binding mechanism by which states become bound (City Pet. 24). Because the *Usery* opinion contains no support for this proposition, the City resorts to slavery-era cases, such as *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1860), for the proposition that federal law may not force state officials to take any affirmative action. *Prigg*, which held, *inter alia*, that a state court has no duty to implement federal law was, in effect, overruled on this point by the Civil War, as the Supreme Court made clear in *Testa* v. *Katt*, 330 U.S. 386 (1947).

To the extent that *Kentucky* v. *Dennison*, *supra*, has any remaining vitality, it limits the ability to require discretionary action from a state official. *Baker* v. *Carr*, 369 U.S. 186, 245 (1962) (Douglas, *J.* concurring). Enforcement of state implementation plans under the Clean Air Act involves only mandatory duties which have been established under the Plan.

The City's reliance upon *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) does not raise a constitutional issue either. *Steward Machine* involved a federal statute which expressly directed states to conform their internal procedures to the federal rules. The Clean Air Act, to the contrary, provides the states with broad freedom so long as the plan devised by the state will result in the meeting of federal ambient air quality state standards. *Train* v. *Natural Resources Defense Council*, *supra*. Furthermore, *Steward Machine* was not a commerce clause case, but a general welfare clause case. U.S. Const. art. I, § 8, cl. 1. The distinction is of primary importance because, while the federal government can spend money for the general welfare, it cannot directly legislate for the general welfare. If Congress were permitted to condition its appropriations in any way it desired, then it would be able to economically coerce from the states all the powers re-

served to them under the Tenth Amendment. Since the Clean Air Act is within the scope of Congress' enumerated powers, the analysis must be made upon the standard of *Usery*, not on the more restrictive standard of *Steward Machine*.

Thus, the City's attempt to paint this case as presenting in ripe fashion the issue not decided in *EPA* v. *Brown*, 97 S. Ct. 1635 (1977), is simply wrong. *EPA* v. *Brown* concerned EPA promulgation of strategies pursuant to remedial authority under Section 110(c). This case concerns a state adopted plan which EPA only approved pursuant to Section 110(a). *Friends III*, 552 F.2d at 36-37. The City's second attempt to relate this case to *EPA* v. *Brown* because of alleged court-ordered legislation is equally wanting. The Court of Appeals held that legislation that may be required is "neither substantial nor directed toward an integral governmental function," and that, in any event, the "essential policy choices involved in creating the program were entirely within the control of the State and the participating City agencies, and not imposed by the federal government." *Friends III*, 552 F.2d at 38. That holding was based upon the Court of Appeals' analysis of *Usery*. The State and City do not attack that analysis, and, hence, have failed to set forth any basis for granting review.

The District Court order, in any event, issued subsequently to *Friends III*, does not compel legislation, but only requires the State and City to certify to the District Court that adequate legal authority exists to perform necessary action under the order. (E.g., City Pet. App. IV 105-107). The only time that the State has had to make such a certification, it certified that existing State legislation was adequate. On March 14, 1977, the State certified that there was no additional need for State legislation to collect bridge tolls on the East and Harlem River bridges. Furthermore, although the City

broadly asserts that no legislative body has ever ratified or passed legislation authorizing State or City officials to take steps required under the Plan, the fact is to the contrary. The State Legislature, to implement the Plan, passed legislation necessary to require retrofit of heavy-duty vehicles (Strategy A-2) and to begin emission inspections for light-duty vehicles (Strategy A-5). 1975 N.Y. Laws, chs. 761 and 762. The purpose in passing these statutes was to comply with the Plan. 1975 N.Y. Laws 1696, 1771-72 (McKinney).

The remaining claims of the City and State are not of constitutional dimension, but are wholly statutory or state law questions. Section 307 has been upheld as an important and intentional procedural device to speed finality in the adoption of Plans. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975). The State and City do not attack those holdings. Nor do the State and City assert that the Congressional scheme is unconstitutional or violates the principles laid down in *Bowles* v. *Willingham*, 321 U.S. 503 (1944) and *Yakus* v. *United States*, 321 U.S. 414 (1944). This case is thus unlike *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1 (6th Cir. 1976), *cert. granted*, 97 S. Ct. 1596 (1977), where the petitioner claims that the regulation is invalid on its face and where it had not participated in the adoption, submission and review of the regulation, all in the context of a criminal case.

The State and City do make a vague claim that they are entitled to an exception to procedural requirements whose constitutionality and literal meaning they do not challenge. But their plea for an exception is undercut in this case by the absence of a strong substantive argument, by res judicata and related doctrines, and by consideration of fairness. First, they simply do not assert that the Court of Appeals erred in its application

of *Usery*. Second, the issues they do raise were all decided in *Friends I*, where the Court of Appeals upheld the legality and enforceability of the 1973 Plan in a Section 307(b)(1) proceeding in which the State participated and argued that the Plan was lawfully approved by EPA. No party sought certiorari from that decision. Both *Friends II* and *Friends III* relied upon the prior holding and conclusion that the Plan, submitted by the State and City, was controlling and must be carried out, and that it was binding upon and enforceable against state and local officials. *Friends II*, 535 F.2d at 169, 170; *Friends III*, 552 F.2d at 31, 32, 34-35.

Yet in their petitions for certiorari the State and City nevertheless assert that the Plan was void ab initio because of flaws in the state procedures used to adopt and submit the Plan to EPA. But these state law claims go to whether the Plan is binding and enforceable against State and City officials—the precise issue settled in *Friends I*. The State and City offer no explanation as to how this court can now review that decision's unappealed and settled holding.

The issues of collateral estoppel and res judicata are substantial. The City and State prepared the Plan together in extremely close cooperation. *Friends III*, 552 F.2d at 30 n.3, 34, 35; *see also prepared statement of Robert A. Low*, Implementation of Transportation Controls: Hearings Before the Subcom. on Environmental Pollution of the Senate Comm. on Public Works, 93d Cong., 2d Sess. 397 (1974). The State submitted the Plan on behalf of itself and the City, and then defended it in the Court of Appeals. *Friends III*, 552 F.2d at 30 n.3,

31. There is direct evidence of petitioners' knowledge that the Plan would be enforceable in the form of written legal advice dated September 11, 1973. *Friends III*, 552 F.2d at 34-35. That written advice preceded the oral argument in *Friends I* by seven months and the decision by nine months. (Oral argument on April 24, 1974 and decision on July 1, 1974).

The argument for an exception would appear hopeless in any event. EPA and the Court of Appeals in *Friends I* relied upon the Mayor, the Governor and the State Attorney General as to the legality of the Plan. As this Court has held with respect to a State's Eleventh Amendment rights:

> "the immunity of sovereignty from suit without [the State's] consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." *Porto Rico* v. *Ramos*, 232 U.S. 627, 632 (1914).

The third major misstatement made by the State and City is that they are locked into their prior decisions. But here again, the facts are to the contrary. The Clean Air Act provides administrative routes to amend or change earlier choices of policy by the State and City; postponement, revision and variance, and administrative compliance orders. *Train* v. *Natural Resources Defense Council, supra; Union Elec. Co.* v. *EPA, supra.* The State and City never sought either a postponement, variance or revision, and failed to come to agreement with EPA on compliance orders. Thus, the failure to alter the 1973 Plan lies not with the statute, but with the conduct of the defendants.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

ROSS SANDLER and DAVID SCHOENBROD
Attorneys for Respondents
(Natural Resources Defense
Council, Inc.)
15 West 44th Street
New York, New York 10036
(212) 869-0150

Assisting on this Brief
ERIC A. GOLDSTEIN, ESQ.
MICHAEL GERRARD

APPENDIX

APPENDIX I

Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4500

FRIENDS OF THE EARTH, etc.,

Plaintiffs,

vs.

HUGH CAREY, et al.,

Defendants.

July 5, 1977
2 P.M.

Before: KEVIN THOMAS DUFFY,
District Judge.

APPEARANCES:

Ross Sandler, Esq.,
David Schoenbrod, Esq.,
Eric Goldstein, Esq.,
Attorneys for Plaintiffs.

W. Bernard Richland, Esq.,
Attorney for City Defendants,

By: Joseph Bruno, Stephen Kramer and Jack Brennan,
Assistant Corporation Counsel.

Louis J. Lefkowitz, Esq.,
Attorney for State Defendants,

By: Paul Shemin, Esq., of Counsel.

Robert B. Fiske, Esq., U.S. Attorney,
Attorney for Federal EPA,

By: Anne Eristoff, Esq., Assistant U.S. Attorney.

(DUFFY, J.)

Plaintiffs have moved this Court for an order compelling the city defendants to comply with Strategy B-3 of the Transportation Control Plan, the parking reduction strategy as it is incorporated into the February 22, 1977 order of this Court.

The defendant United States Environmental Protection Agency (the EPA) has joined in the plaintiffs' application. The city defendants have cross-moved to modify or to stay the February 22, 1977 order. The State apparently has joined in the city's motion.

Prior to discussing the arguments advanced by the parties, it would be useful to briefly outline the history of the Transportation Control Plan and of this case.

In 1970 Congress amended the Clean Air Act to require the Administrator of the EPA to establish two types of air quality standards: The "primary ambient", which was intended to protect the public health, and the "Secondary ambient", designed to protect the public welfare.

The primary standards governing pollution levels were promulgated on April 30, 1971. Section 110(a) of the Clean Air Act required each State to submit a plan providing for implementation, maintenance and enforcement of the primary standards. Each State plan was to be filed by April 1973, and the primary air quality standards actually met by May 31, 1975.

The State of New York did in fact submit a plan to the EPA on April 17, 1973, entitled "The Transportation Control Plan for the Metropolitan New York City Area," which contained 32 so-called strategies for reducing air pollution. Among them were the four strategies contained in my February 22, 1977 order: a selective ban on taxi

cruising, a limitation on after-hour deliveries, a reduction of parking and the imposition of tolls on the East and Harlem River crossings.

On June 22, 1973, the EPA approved the plan submitted by the State of New York with a few modifications including the grant, at the State's request, of a 19-month extension to comply with the photo-chemical oxidant and carbon monoxide standards.

Following the EPA approval, a group known as Friends of the Earth petitioned the Court of Appeals pursuant to Section 307(b)(1) of the Clean Air Act for review of the approved New York plan, alleging that it was inadequate to meet the air quality standards of the Act. The Court of Appeals substantially upheld the plan and remanded to the EPA for review of several aspects of the plan. In the same opinion the Court of Appeals, by Judge Lumbard, declined to order compliance with the plan on the ground that the jurisdiction to enforce did not lie with the Court of Appeals, but rather with the District Court through an enforcement action brought by the EPA under Section 113 of the Clean Air Act, or by a private citizen under Section 304.

On August 5, 1974, the plaintiffs served notice under Section 304(b)(1)(a) of their intention to commence a citizens' suit. On October 11, 1974, at the expiration of the required sixty-day waiting period the plaintiffs commenced this action. Thereafter, the plaintiffs moved for a preliminary injunction enforcing the plan. In oral argument the Assistant Attorney General representing the State of New York acknowledged that, and I quote: "This plan is a legally enforceable plan, is a legally adequate plan and that the State is committed to fulfilling its responsibilities thereunder."

At that time the Assistant Attorney General also advised this Court that the Governor Elect supported fully the implementation of the plan as it existed. The attorney for the city defendants argued that I should deny the injunction, in light of the pendency of negotiations with the EPA aimed at a revision of the plan.

On December 16, 1974, I ruled that "The policy favoring judicial restraint in cases such as this coupled with the probability of enforcement action by the USEPA dictate the application for preliminary injunction at this time be denied."

389 F. Supp. 1394, 1396.

Seven months later plaintiffs moved for an injunction against the planned increase in the New York City subway fare and again moved for injunction enforcing the Transportation Control Plan. Once again I denied the injunction against the fare increase, since the Transportation Control Plan contained no provision addressing the subway fare. And I denied the renewed request for enforcement of the plan and denied summary judgment to the plaintiffs.

There is an opinion on that in 401 F. Supp. 1386.

On August 29, the day after my filing that opinion, the plaintiffs filed a notice of appeal from my order.

On September 23, 1975, the city moved to dismiss the complaint on the constitutional grounds. The motion was held in abeyance pending the appeal to the Second Circuit.

On April 26, 1976, a panel of the Court of Appeals affirmed my decision not to enjoin the fare increase, but

reversed my denial of summary judgment to the plaintiffs. In so doing the Court of Appeals stated as follows:

"In denying relief under the citizen suit provision the Court referred to the existence of ongoing negotiations between the EPA and the State and City authorities designed to reach consent decrees in carrying out the Plan's mandated strategies. We join the District Court in recognizing the utility of such deliberations and the desirability of obtaining compliance through consentual means. But it is equally clear that the statute empowers neither the EPA nor the State to delay the approved Plan's strategies through negotiations, be they formal or otherwise. Negotiations are no substitute for enforcement and for timely compliance with the Plan's mandated strategies. Consequently, the District Court erred in permitting the continuation of the EPA-State discussions to bar suit by citizens groups seeking judicial enforcement of the Plan's expressed provisions. The Act authorizes only two procedural routes for modifying the Plan: a Section 110(a)(3) revision or a Section 110(f) postponement. In all other instances the State is relegated to a lone option: compliance." That can be found at 535 F.2d 165 at 178.

Partial summary judgment for the plaintiffs was then entered. The city petitioned the Court of Appeals for a rehearing. And although rehearing was denied, the Court of Appeals modified its mandate to permit me to consider the city's motion to dismiss as previously mentioned, which was filed on September 23, 1975.

In an opinion on July 13, 1976, reported at 422 F. Supp. 638, I ruled, and I am quoting only in part, "that the proper construction of Section 304 is that

citizen suits are authorized against the states and their subdivisions only to the extent that they are actual polluters or violators of the plan's requirements."

The parties appealed from my order and the plaintiff filed a petition for a writ of mandamus against me in the Court of Appeals.

In January 18, 1977 the Court of Appeals reversed my determination and granted the petition for mandamus, directing me to reinstate partial summary judgment as to the four strategies.

In the course of its opinion on the Court stated as follows:

"At this date, almost four years after the Administrator's approval of the Plan, to permit the City to renege upon its commitments would defeat the purpose of the Act, which is to protect the public health.

"Since the City could have advanced its present contentions by way of a petition for review of the Administrator's approval of the Plan in 1973 and chose instead voluntarily to commit itself to enforcement of the plan, we hold that the City has waived its right to assert these contentions."

That is found at 552 F.2d 25 at 35.

On the very same date that the mandate from the Court of Appeals was filed, I ordered all counsel in this case to appear before me. Counsel for the City was asked if there was any reason why I should not enter partial summary judgment for the plaintiff in light of the Court of Appeals mandate. Counsel for the City voiced no objection and in fact indicated that the form of the order

submitted by counsel for the plaintiff and for the EPA was agreeable to the City with the sole exception of the dates for compliance with various stages of the plan.

* * * * *

On February 22, 1977, I filed an order which incorporated the four strategies contained in the plan. The order established a series of compliance deadlines aimed at the ultimate implementation of those strategies. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure the city defendants now seek to stay two of the four strategies, the parking reduction strategy, B-3, and the bridge tolls strategy, which is B-7.

In support of its application the city has filed a 300-page submission which includes affidavits from the Corporation Counsel, the Mayor, the Deputy Mayor for Economic Development, Chairman of the New York City Chamber of Commerce, the Administrators of the New York City Environmental Protection and Transportation Agencies, and the Police Commissioner.

Included as exhibits to the affidavits are a study entitled "Evaluation of the Economic Impact of the Court-ordered Transportation Control Plan Strategies," dated June 21, 1977, a June 1977 study of the Transportation Control Plan prepared by the Department of Air Resources, and an April 1977 study by the New York City Transportation Administrator, entitled "Traffic impact of tolls on the East and Harlem River Bridges."

The plaintiffs herein have produced a number of documents which if this were a trial could be considered affecting the viability of such studies. This is not a trial, howerer, and I see no need to get into the matter.

In seeking a stay or modification, the City relies upon the principle of equity, succinctly stated in Justice Car-

dozo's opinion in *United States* v. *Swift & Company*, 286 U.S. 106; page 114, 1932, "A continuing decree of injunction directed to events to come is subject always to adaptation as events shape the need."

This approach can also be found in other cases but not as well put. Thus it is for me now to determine whether any events have occurred since the entry of the February 22, 1977 order which would suggest the need for adaptation or stay of the order.

The arguments advanced by the city fall into four broad categories.

First, that the plan will be economically destructive to the city.

Second, that the plan will be ineffective in reducing air pollution.

Third, that the plan removes discretion from city officials to cope with police and traffic problems.

And fourth, that the likelihood of the Supreme Court granting the city's petition for certiorari warrants a stay.

The economic consequences of the plan and its effectiveness in improving air quality are issues which were assessable by the city officials long before the entry of the February 22nd order. Although the city has conducted surveys and studies, apparently since February 22, there is no indication that these studies were based upon newly developed facts. Rather, they appear to be based on data which has always been obtainable.

The effectiveness of the plan and its economic consequences are indeed the legitimate concerns of the municipal officials. But the time to begin evaluation is not after the submission of the plan, approval by the EPA, three appeals to the Second Circuit and the entry of a final order enforcing the four strategies. To permit a stay of the plan at this stage would be to place a premium upon inaction.

The claim of unwarranted interference with the discretion of the city officials was raised in the city's motion to dismiss on Tenth Amendment grounds, and as previously noted, I ruled substantially in the city's favor. But that determination has since been reversed on appeal. Having raised the claim and lost, the city defendants may not attempt to relitigate in this forum.

Nor does the pending of a petition for writ of certiorari provide an adequate basis for a stay. No factual or legal basis has been offered for the Corporation Counsel's belief that the city's certiorari petition will be acted upon favorably. Before a stay will be granted, more must be shown than a party's belief that his side will ultimately prevail. See *O'Brien* v. *Brown*, 409 U.S. 1 (1972).

In the light of the lengthy history of this case and the express direction of the Court of Appeals that I implement the plan expeditiously, the application for a stay is denied.

The city officials are not, however, without recourse to present new insights into the efficacy of the plan. Congress has provided that revisions of an approved plan may be sought through application to the EPA pursuant to Section 110(a)(3) of the Clean Air Act. A postponement may also be sought under Section 110(f). The

EPA, the agency responsible for enforcing the Clean Air Act, is best able to determine whether aspects of the plan require revamping.

I now turn to the joint application by the plaintiffs and the EPA to compel compliance with my order as it related to strategy B-3, the parking reduction strategy. The order requires the City defendants to submit to the EPA by May 14, 1977 a detailed work program to reduce and manage parking throughout the borough of Manhattan.

In regard to the Midtown Core—that area of Manhattan from 59th Street to 34th Street and 8th Avenue to 3rd Avenue—the submission was to contain a plan to eliminate all legal on-street parking spaces by June 14, 1977 as well as a plan to eliminate illegal on-street parking by January 14, 1978 through increased towing capabilities at a minimum level of removal of 500 automobiles per day. The City was to have submitted legally enforceable limitations upon the construction of new commercially available and non-commercially available parking spaces within the Midtown Core.

As to the Downtown Core—that area extending from Canal Street to the extreme southern tip of Manhattan between the East and Hudson Rivers—the City was required to submit a work plan—also by May 14, 1977—to provide for a ban on general on-street automobile parking between the hours of 8:00 A.M. and 6:00 P.M. with the exception of existing metered spaces which could be used legally at times other than rush hours. That is, from 7:00 A.M. to 10:00 A.M. and from 4:00 P.M. to 7:00 P.M. on week days. The ban was to take effect on June 14, 1977.

The downtown core work plan was also to have contained provisions for eliminating illegal on-street parking by January 14, 1978, through increased towing capabilities. Legally enforceable limitations on construction of new commercially-available and non-commercially available parking also were to have been submitted.

For the peripheral area, that is, the remainder of Manhattan south of 59th Street from the East River to the Hudson River, those areas between Canal Street and 59th outside of the midtown core, the city was to have submitted a work plan by May 14 to provide for a ban on general on-street parking from 8:00 A.M. to 6:00 P.M. on week days with the exception of existing metered spaces which could be used legally at times other than rush hours. The peripheral area ban is to become effective in August, on August 31, 1977. The peripheral area work plan could at the city's option provide for parking on specified streets which are primarily residential and are zoned as such. Also by May 14, the city was to have submitted work plans for parking surcharges, late openings, car pool rate reductions, space capacity limitations by time of day and zoning bonuses for closings. In addition, a parking space inventory was to have been submitted.

The attorney for the Environmental Protection Agency has filed an affidavit with this Court, dated June 27, 1977, in which she submits that "The city defendants failed to submit any program of any kind to EPA by May 14, 1977, and none has yet been submitted."

Actually, on May 14, 1977, this Court did receive a submission from an Assistant Corporation Counsel which stated in part as follows:

"Pursuant to Paragraph E"—and I am quoting again—"of the order implementing Strategy B-3, I wish to advise the Court that it is impossible for the city to make a submission required by Paragraph A," which concerns the midtown core, the downtown core and the peripheral area, insofar as these paragraphs relate to illegal on-street parking. "Enclosed herewith are copies of documents relating to the police department's towing program. It is the City's belief that the number of tows required by the paragraphs of the order was erroneously computed.

"We will shortly seek modification of the order so as to correct this error. In addition, it is impossible to comply with the provisions of paragraph A(a)(II)(aa)" —that is the downtown core—"insofar as the paragraph relates to legal on-street parking because of the time required to manufacture and install necessary parking signs. Moreover, the submissions required by Paragraph A(2)(IV)" which deal with parking surcharges, late openings and car pools and all the rest of that, "will be included in the Parking Management Study." A copy of a proposed contract for this study was submitted to this Court on April 1, 1977.

Accompanying the letter were a number of submissions which purported to comply with the February 22 order: For example, the city submitted the following work plan for the midtown core, and I quote: "There are 206 meters with a revenue of $200,607. The meters can be made inoperative within 30 days by the Department of Traffic."

It is apparent from the city's own admissions contained in its May 14 letter to the Court that it has not fully complied with my order. My order required a work plan. Nothing even approaching that was submitted.

One of the immediate consequences of the failure to submit a proper work plan in advance of implementation is the present dispute among the parties as to the scope of the parking ban for the midtown core.

On June 14, 1977, the city imposed a 24-hour ban on all on-street parking in the midtown core. Plaintiff argued that the city's action was over-inclusive and a ban during business hours is all that is required. Had the city properly submitted its work plan to the EPA prior to the implementation, the ambiguity of which we heard so much today could have been eliminated prior to today.

In light of the city's admitted failure to comply with the order, the following is hereby ordered:

"1. Counsel for the EPA is directed to forthwith submit a proposed order incorporating the one amendment to the February 22 order which I have approved already; that is, modification of the effective hours of midtown core parking ban;

"2. The city is directed to submit to the EPA within ten days the work plans required by Paragraphs 2(a)(i)(aa) and 2(a)(ii)(aa) of the February 22 order;

"3. The city is directed to submit to the EPA within thirty days all other materials which were originally due on May 14;

"4. Should any of the defendants fail to comply with any of the above directons, counsel for the plaintiff or for the Environmental Protection Agency may commence contempt proceedings by submitting a proposed order to show cause."

So ordered.

Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1718 and 76-1737

In the Supreme Court of the United States

OCTOBER TERM, 1977

ABRAHAM BEAME, ET AL., PETITIONERS

v.

FRIENDS OF THE EARTH, ET AL.

HUGH L. CAREY, ET AL., PETITIONERS

v.

FRIENDS OF THE EARTH, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Acting Assistant Attorney General,

EDMUND B. CLARK,
MICHAEL D. GRAVES,
NEIL T. PROTO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JOAN BERNSTEIN,
General Counsel,

GERALD K. GLEASON,
Deputy Associate General Counsel,

LAWRENCE NOVEY,
Attorney,
Environmental Protection Agency,
Washington, D.C. 20460.

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HUGH L. CAREY, ET AL., PETITIONERS

v.

FRIENDS OF THE EARTH, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION *

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* This brief was filed with this Court and served in typewritten form on August 3, 1977. The only substantive changes appearing in this printed brief are footnote 2, *infra*, and the second sentence of paragraph 2 on page 4, *infra*.

OPINION BELOW

The opinion of the court of appeals is reported at 552 F.2d 25 and is reproduced as Appendix I to the petition in No. 76-1718.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977 (No. 76-1718, Pet. App. I, 1-3), and a timely petition for rehearing was denied on March 4, 1977 (No. 76-1718, Pet. App. II, 62-66). The petition for a writ of certiorari in No. 76-1718 was filed on June 2, 1977. The petition for a writ of certiorari in No. 76-1737 was filed on June 6, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provisions of a Transportation Control Plan, prepared by the State of New York with the cooperation of the City of New York and approved by the Environmental Protection Agency pursuant to Section 110 of the Clean Air Act can be enforced against the State and the City in a "citizen suit" under Section 304 of the Act.

STATUTES INVOLVED

The relevant provisions of the Clean Air Act are reproduced in the Appendix, *infra*.[2]

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[1] See page 12, *infra*.

[2] Quotations herein from the Clean Air Act do not reflect the Clean Air Amendments of 1977, signed on August 7, 1977. Those Amendments do not affect any issues in this case.

STATEMENT

1. The Administrator of the Environmental Protection Agency (EPA) is directed by the Clean Air Act, 77 Stat. 392, as amended and added, 42 U.S.C. (and Supp. V) 1857 *et seq.* (the Act), to establish standards governing maximum concentrations of particular pollutants in the air (Section 109, 42 U.S.C. 1857c-4). On April 30, 1971, the Administrator promulgated national primary and secondary air quality standards for those pollutants resulting chiefly from motor vehicle emissions. 36 Fed. Reg. 8186. Thereupon, it became the responsibility of each state government to "specify the manner in which * * * air quality standards will be achieved and maintained" within the state (Sections 101(a)(3), 107(a), 42 U.S.C. 1857(a)(3), 1857c-2(a)).

Under the Act, each state must submit to the Administrator a plan for "implementation, maintenance and enforcement" in that state of the national primary and secondary standards (Section 110(a)(1), 42 U.S.C. 1857c-5(a)(1)). These implementation plans provide the regulatory scheme for controlling emissions from stationary and moving sources of pollution to the extent necessary to attain the national standards. The required elements of a state implementation plan include, *inter alia*, such methods of pollution control "as may be necessary * * *, including, but not limited to, land-use and transportation controls" (Section 110(a)(2)(B), 42 U.S.C. 1857c-5(a)(2)(B)), and a procedure for "inspection and testing of motor vehicles" (Section 110(a)(2), (G), 42 U.S.C. 1857c-5(a)(2)(G)).

The Administrator's approval or disapproval of an implementation plan is subject to judicial review pursuant to Section 307(b), 42 U.S.C. (and Supp. V) 1857h-5(b), which provides that a petition for review of the Administrator's action "shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." That section also provides that actions of the Administrator with respect to which review could have been obtained under the section shall not be subject to judicial review in civil or criminal proceedings for enforcement. In addition, Section 304 of the Act, 42 U.S.C. 1857 h-2, authorizes "citizen suits," whereby "any person" may commence a civil action against any federal, state or local instrumentality for violating a provision of a state implementation plan.

2. The New York State Implementation Plan was submitted to EPA on January 31, 1972, and approved by the Administrator on May 31, 1972, pursuant to Section 110(a)(2) of the Clean Air Act, 42 U.S.C. 1857c-5(a)(2). This plan did not contain transportation control measures. On April 17, 1973, the State of New York, after consultation with petitioners in No. 76-1718 (hereafter "City petitioners"), submitted its Transportation Control Plan (Plan), including a plan to control motor vehicle pollution in the New York City metropolitan area. The Plan submitted by the state was approved by the Administrator on June 22, 1973, with minor exceptions.

3. Within the 30-day statutory deadline provided in Section 307(b)(1), 42 U.S.C. (and Supp. V) 1857h-

5(b)(1), respondents challenged the Administrator's approval of the Plan in the court of appeals. The primary challenges related to the vagueness of portions of the Plan, and the failure of the state to begin its implementation. The court upheld the plan in all substantial respects, remanding only for further explanation of certain points. The court held, however, that it lacked jurisdiction to order the state to implement the Plan in a Section 307 proceeding. *Friends of the Earth* v. *Environmental Protection Agency (Friends I)*, 499 F.2d 1118 (C.A. 2).

On October 11, 1974, respondents filed a "citizen suit" under Section 304(a) of the Act, seeking a mandatory injunction against appropriate state and city officials requiring compliance with the New York Plan. The district court denied the request for injunctive relief in light of the "total lack of expertise in the court" and "the existence of a federal agency with such expertise charged with the enforcement of the highly technical and difficult problems involved." *Friends of the Earth* v. *Wilson*, 389 F. Supp. 1394, 1395 (S.D. N.Y.). The court noted, however, that "the State and City do not found their opposition to the preliminary injunction on the grounds that they are in compliance"; that, in fact, counsel for the State "stated in open court * * * that 'this plan is a legally enforceable plan, is a legally adequate plan and that the state is committed [obligated] to fulfilling its responsibilities thereunder'" (*id.* at 1395). "He went on to say," the court noted further, "that the State apparently had no intention of implement-

ing certain strategies of the plan and observed, 'If there is a valid legal ground for such a refusal, we have not been able to find it, your honor.'" *Ibid.*

After EPA found that the State and City were in violation of certain aspects of the Plan, respondents returned to the district court seeking a preliminary injunction against both state and city officials ordering Plan enforcement. On August 28, 1975, the district court denied the request for relief, *Friends of the Earth* v. *Carey*, 401 F. Supp. 1386 (S.D. N.Y.).

The court of appeals reversed. *Friends of the Earth* v. *Carey (Friends II)*, 535 F.2d 165 (C.A. 2). It held that once a suit is commenced under Section 304 the "district court is obligated upon a showing that the state has violated the plan, to issue appropriate orders for its enforcement" (*id.* at 173), regardless of whether EPA sought judicial enforcement under Section 113 of the Act, 42 U.S.C. 1857c-8 (*ibid.*). "[I]t is beyond serious dispute," said the court, "that the defendants are now almost a year in default in carrying out the principal strategies of the mandated Plan, which are central to achieving the primary ambient air quality standards prescribed by Congress, with the result that the public of New York City is exposed to carbon monoxide pollution that has in the meantime climbed to over five times the federal health standards. The court cannot consistently with its duty be a party to the delaying process that has led to this situation." *Id.* at 180. It remanded the case, ordered the district court to enter partial summary judgment for respondents and expeditiously

"take such further steps as are necessary to insure enforcement." *Ibid.*

4. On April 30, 1976, the district court ordered implementation and enforcement of appropriate portions of the Plan. In the interim, the City petitioners sought rehearing in the court of appeals "to raise constitutional issues with respect to the Plan which had not previously been considered" (Pet. App. I,[3] 6). On June 2, 1976 the court denied the petition (*id.* at 6-7):

> '[W]ithout prejudice to consideration by the United States District Court for the Southern District of New York of constitutional issues not decided prior to the entry of the order which was the subject of the notice of appeal * * * and without prejudice to the right of the defendants to move in the said District Court to set aside the order of the District Court dated April 30, 1976, on the aforesaid constitutional grounds.'

Thereafter the City petitioners moved the district court to vacate the partial summary judgment entered on April 30, 1976, and for summary judgment in the city's favor based on 10th Amendment infirmities.

On July 13, 1976, the district court granted the City petitioners' motion. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D. N.Y.). The court concluded that it could consider constitutional objections to the Plan raised by the City petitioners for the first time in this enforcement proceeding despite

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[3] "Pet. App." refers to the petition in No. 76-1718.

their failure to raise them under Section 307(b) within 30 days after the Plan was approved by EPA. *Id.* at 640-641.

On the merits of the City petitioners' contention, the district court examined cases presenting Tenth Amendment challenges by various state governments to transportation control plans (TCP's) prepared *for them* by the Administrator of EPA pursuant to Section 110(c)(1) of the Act, 42 U.S.C. (and Supp. V) 1857c-5(c)(1). *District of Columbia* v. *Train*, 521 F.2d 971 (C.A. D.C.); *Maryland* v. *Environmental Protection Agency*, 530 F.2d 215 (C.A. 4); *Brown* v. *Environmental Protection Agency*, 521 F.2d 827 (C.A. 9).[4] In general, these cases held that the Administrator was not authorized by the Clean Air Act to compel a State or municipality to implement certain aspects of an EPA-formulated TCP against polluters. The district court characterized the Plan here, although formulated by New York State, as the "functional equivalent of the suggestions of an interested party," and concluded that "approval of the plan was the functional equivalent of promulgation by the Administrator of his own plan." 422 F. Supp. at 645. Therefore, the court reasoned, although the New York Plan was formulated by the City and State, "it is in the same posture as a plan which the Administrator has promulgated" for a state under Section 110(c)(1) (422 F. Supp. at 645), and as in *Brown* v. *Environmental Protection Agency* and similar cases *supra*, the State and City cannot be compelled to implement the New York Plan pursuant to a citizen suit. *Id.* at 643.

[4] At the time of the district court decision, this Court had granted certiorari in each of these cases. On May 2, 1977, the judgments were vacated and the actions remanded for consideration of mootness, in light of EPA's representation that certain modifications to the regulations were necessary. *Environmental Protection Agency* v. *Brown*, Nos. 75-909, 75-960, 75-1050 and 75-1055. Those modifications have now been made. See 42 Fed. Reg. 30504 (June 15, 1977). The issues in *Brown* are now ripe for consideration by the courts of appeals and, if necessary, by this Court. The state petitioners in both *Brown* and *Maryland* have stated to the respective courts of appeals that the issues are not moot. Oral argument on both the question of mootness and the merits has been scheduled in *Brown*.

The court of appeals reversed (Pet. App. I). The court noted its decision to permit the City petitioners to raise "constitutional issues" but stated that in "so ruling we did not authorize the district court to engage in reinterpretation that would contradict our own prior considered construction of it or our determination as to the scope of enforceability." Pet. App. I, 6-7.

On the merits, the court of appeals characterized the district court opinion as having "emasculated the Plan as an enforceable instrument." Pet. App. I, 9. Its analysis began with the fact that the "State of New York, with the assistance of the Department of Air Resources of the New York City Environmental Protection Administration and other city agencies, prepared and promulgated the Plan here at issue * * *" (Pet. App. I, 13-14, and n. 3), and that the "State has not only failed to join the City in asserting the latter's defenses to enforcement of the Plan but,

to the contrary, has defended the Plan and concedes that it is enforceable against it." Pet. App. I, 30-31. The court concluded that the City petitioners were precluded from raising objections that could have been raised in a Section 307 petition for review. The court stated (Pet. App. I, 33-34):

> The purpose of § 307 was to assure that once an implementation plan had been promulgated by a state and approved by the EPA and a reasonable time had been allowed for affected parties to seek by way of a petition for review to have it modified or nullified, it would have finality and become enforceable. If states and their subdivisions, after preparing and through their responsible executives accepting the obligation of enforcing implementation plans under the Act, were allowed to disregard their commitments and to renege upon the obligations undertaken by them, the plans would amount to nothing more than voluntary, unenforceable declarations of principles. * * *
>
> In order to protect public health effectively Congress provided that such plans, after fair allowance for due process, would be enforceable. For these reasons § 307 has been upheld as a bastion of enforceability. See *Union Electric Co.* v. *EPA*, 44 U.S.L.W. 5060 (June 25, [1976]); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

The Court also questioned the propriety of the fact that the City was raising objections to the Plan it helped design, after remaining silent through the critical period of Plan approval by EPA and judicial review in *Friends I*.

> [T]he picture before us is one where the City, having voluntarily cooperated with the State in the drafting and promulgation of the very strategies now attacked by it, seeks in effect to renege on its own creation and commitment.
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> The architects of the Plan were not Congress or the EPA but the State and City of New York. * * * In clear and unmistakeable [*sic*] terms the Plan obligates them to carry out the very strategies which the City now contends that it cannot be ordered to enforce [Pet. App. I, 35-36.]

To permit the City petitioners now to attack the validity of the Plan, the court stated, would be "directly contrary to our holding that 'acceptance by the EPA and judicial ratification by this court' resulted in the Plan becoming 'binding upon and enforceable against state and local officials' * * *." *Id.* at 44.

Despite the restrictions in Section 307, 42 U.S.C. (and Supp. V) 1857h-5, and the binding effect of *Friends I*, the court noted that the state possessed an available statutory remedy to deal with funding or personnel problems. "Should the State conclude that the Plan should be revised, it may submit such revisions as are necessary to the Administrator for approval under § 110(a)(3) of the Act." Pet. App. I, 42. See also *id.* at 43-45.

Finally, the court rejected the district court's conclusion that EPA's approval of a state-developed TCP was no different from EPA's promulgation of one (*id.* at 45). It stated (*id.* at 47-48):

> Although the district court here attempted to place the present case within the mold of *Brown, District of Columbia* and *Train*, the facts and the issues here are significantly different and clearly distinguishable. The most fundamental difference lies in the fact that, in contrast to those cases, the State here has clearly and unequivocally promulgated its own pollution-control plan which represents its own policy decision, formulated through public notice by the State to its citizens and local governments, and through State-conducted public hearings.

Nor did the court of appeals find this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833, an obstacle to citizen enforcement.

> The present case represents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government. In formulating, proposing, and revising the Plan through public notice and public hearings, the State exercised its sovereign powers to make policy choices participated in by its citizens and its political subdivisions. [Pet. App. I, 52-53.]

EPA's approval of the Plan was mandatory once the criteria of the Act were met, and did not alter the substantive provisions of the Plan or affect the State's "policy choices" which resulted in those provisions. *Id.* at 53.

ARGUMENT

1. The petition in No. 76-1737 is jurisdictionally out of time under 28 U.S.C. 2101(c). The court of appeals denied rehearing on March 4, 1977. The time for filing a petition for a writ of certiorari was not extended and, accordingly, expired on June 2, 1977. The petition was filed June 6, 1977. Further references to "petitioner" or the "petition" in this brief refer to No. 76-1718.

2. Petitioners' contention (Pet. 5) that this case "presents the Court with the occasion to deal with the issues previously presented to it in *EPA* v. *Brown* and its companion cases * * * and upon which the Court did not finally decide" is incorrect.

First, no such issues can be reached at all unless this Court were to reject the holding of the Court of Appeals that the objections were made too late in light of Section 307 of the Act. See Point 3, *infra*. But, in any event, the *Brown* issue is not present here.

Brown and its kindred cases presented a significantly different issue: whether EPA could lawfully promulgate binding transportation control plans for states which had failed to prepare their own plans as required by Section 110, 42 U.S.C. (and Supp. V) 1857c-5. As this Court said in vacating and remanding the cases, "[t]hese cases * * * raise questions concerning the authority of the Administrator * * * to compel various types of implementation and enforcement actions by the States. * * * The critical fact about all the foregoing obligations was that they were imposed on the states, under 40 C.F.R. § 52.23, as elements of an applicable implementation

plan." Slip op. 1-2. Unlike the transportation control plan promulgated for California by the Administrator in *Brown, supra*, and its companion cases, the New York Plan was "prepared and promulgated" by the State of New York with the "cooperation and extensive effort" of City petitioners. Pet. App. I, 13-14, and n. 3. The issue of whether the federal government may "coerce" States and localities into implementing an EPA-prepared plan, allegedly in violation of the Tenth Amendment, is simply not present here.

Contrary to the district court's view, the fact that New York was required by Congress to adopt a plan does not reduce New York to a mere "interested party" in a federal proceeding, nor does it make this Plan indistinguishable from one imposed on a state by the Administrator. The narrow view of the district court entirely overlooks the fact that the Administrator is *required* to approve a State plan that conforms to the statute. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79. Unlike the situation in *Environmental Protection Agency* v. *Brown, supra*, New York here was "at liberty to adopt whatever mix of emission limitations it deem[ed] best suited to its particular situation." *Id.* at 79. It was given "virtually absolute power in allocating emission limitations so long as the national standards are met," *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246, 267, and so is in no position to claim that the EPA has imposed a plan upon it.[5]

[5] The court of appeals stated the "present case presents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government." Pet App. I, 52-53. "Federal imposition of policy never took place in this case * * *." *Id.* at 59.

Instead, the court found the federal-state-local relationship in this case analogous to that envisioned in the Economic Stabilization Act of 1970, upheld in *Fry* v. *United States*, 421 U.S. 542, and distinguished by the Court in *National League of Cities, supra*. Pet. App. I, 57-60.

3. Petitioners further contend (Pet. 22-25) that the court of appeals erred in refusing to allow objections to the New York transportation control plan in this proceeding because petitioners failed to raise them in the manner prescribed by Section 307 of the Act. As we have noted, that was an independent ground supporting the court's judgment, which if correctly decided, alone disposes of petitioners' challenges to the plan.

In our view, the court of appeals rightly concluded that Section 307(b)(2) of the Act precludes petitioners from challenging the validity of the plan at this late date. See *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246; *Yakus* v. *United States*, 321 U.S. 414, 427-436.[6] Congress required that

[6] See also *Lloyd A. Fry Roofing Co.* v. *United States Environmental Protection Agency*, 554 F.2d 884 (C.A. 8); *Lubrizol Corp.* v. *Train*, 547 F.2d 310 (C.A. 6); *City of Highland Park* v. *Train*, 519 F.2d 681 (C.A. 7), certiorari denied, 424 U.S. 927; *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F.2d 654, 661 (C.A. D.C.); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F.2d 1351 (C.A. D.C.); *Granite City Steel Co.* v. *Environmental Protection Agency*, 501 F.2d 925 (C.A. 7); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390, 392 (C.A. 9), certiorari denied, 419 U.S. 1034; *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301-1305 (C.A. 10); *Getty Oil Co. (Eastern Operations)* v.

challenges to the validity of a transportation control plan be raised promptly "[i]n order to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). Cf. *Yakus* v. *United States*, *supra*, 321 U.S. at 439.

The court found the application of the principle underlying Section 307(b)(2), 42 U.S.C. (and Supp. V) 1857h-5(b)(2), particularly relevant to the conduct of petitioners, who "cooperated with the State in the drafting and promulgation of the very strategies now attacked by [them]". Pet. App. I, 35. They devised a plan which "[i]n clear and unmistakeable [*sic*] terms * * * obligates them to carry out the * * * strategies * * *. Indeed, the Plan repeatedly refers to and lists the different State and City departments and agencies that are to implement these strategies * * *" (*id.* at 36). "[T]he Plan itself makes it clear beyond any reasonable doubt that both the State and City represented that their responsible officials would carry out each of the detailed strategies outlined in the Plan, using the State and City personnel and facilities described in the plan." *Id.* at 42-43.

Ruckelshaus, 467 F.2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125; *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1 (C.A. 6), certiorari granted April 4, 1977, No. 76-911. Courts applying the parallel judicial review provision of the Federal Water Pollution Control Act also have held that review must be had promptly or not at all. See *Sun Enterprises, Ltd.* v. *Train*, 532 F.2d 280, 287 (C.A. 2); *E. I. du Pont de Nemours and Co.* v. *Train*, 528 F.2d 1136, 1137 and n. 1, 1142 (C.A. 4), affirmed on other grounds, No. 75-978, February 23, 1977; *Peabody Coal Co.* v. *Train*, 518 F.2d 940 (C.A. 6).

Moreover, petitioners failed to pursue their opportunities to avoid their obligations either by advising the Administrator before Plan approval in 1973, or by petitioning for review pursuant to Section 307(b)(1). Petitioners also could have raised "defenses" or objections by intervention or *amicus curiae* participation in *Friends I*, or in the subsequent district court enforcement proceeding, *Friends of the Earth* v. *Wilson*, 389 F. Supp. 1394 (S.D. N.Y.). Instead, the City told the district court it was "in compliance with the plan"; that enforcement should not occur because of "necessary expense and diversion of manpower during the present hiring freeze"; and because the issues were "highly technical." *Id.* at 1395-1396. It was not until four years after EPA approval that the petitioners first sought to raise their present "defenses" to a plan the court of appeals had previously concluded in *Friends I* was "binding upon and enforceable against state and local officials" (Pet. App. I, 42-45).

4. Petitioners are not without recourse, however. Contrary to petitioners' assertions (Pet. 24-25), the Clean Air Act does not "bind a State and its subdivisions to their initial voluntary commitments, notwithstanding that significant changes may thereafter occur * * *." Section 110(a)(3), 42 U.S.C. (and Supp. V) 1857c-5(a)(3), provides a mechanism that permits a revision of the Plan on the State's initiative. As this Court noted in *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 80, the revision section is "the mechanism by which the States may obtain approval of their developing policy choices

as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." Thus, the State has complete discretion in proposing substantive revisions to the Plan if it thinks "significant changes" have occurred since the Plan's approval.[7]

Thus, the substantive objections raised by petitioners can be embodied in proposed revisions to the Plan and submitted to EPA; the Agency action would then be subject to a timely petition for review under Section 307.[8]

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Acting Assistant Attorney General.

JOAN BERNSTEIN,
General Counsel,

EDMUND B. CLARK,
MICHAEL D. GRAVES,
NEIL T. PROTO,
Attorneys.

GERALD K. GLEASON,
Deputy Associate General Counsel,

LAWRENCE NOVEY,
Attorney,
Environmental Protection Agency.

AUGUST 1977.

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[7] To date, the State of New York has chosen not to seek a revision of the Plan; on the contrary, the State has defended the validity of the TCP and has acknowledged its obligation to implement its provisions. Pet. App. 13-14 and n. 3.

[8] Petitioners' objections (Pet. 14-19) to the district court's order following the remand in this case (Pet. App. IV, 79-163) have not yet been presented to the court of appeals and thus are not properly before this Court.

APPENDIX

Relevant provisions of the Clean Air Act, 77 Stat. 392, as amended and added, 42 U.S.C. (and Supp. V) 1857 *et seq.* provide:

Section 107(a) of the Act, 42 U.S.C. 1857c-2(a):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110(a), (c) of the Act, 42 U.S.C. (and Supp. V) 1857c-5(a), (c):

> **(a) Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator.**
>
> (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine

months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attain-

ment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for inter-governmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such other sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards es-

tablished pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h-1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plan and re-

port to the State on whether such plans can be revised in relation to fuel burning statutory sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c-6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as

may be necessary to permit the State to make a determination under clause (A).

* * * *

(c) Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority.

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six

months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge

regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

Section 304 of the Act, 42 U.S.C. 1857h-2:

(a) Establishment of right to bring suit.

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amend-

ment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) Notice.

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States

any person may intervene as a matter of right.

(2) under subsection (a)(2) of the section prior to 60 days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 1857c-7(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 1857c-8(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator.

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Award of costs; security.

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Non-restriction of other rights.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Definition.

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this chapter (including a requirement applicable by reason of section 1857f of this title or under an applicable implementation plan.

Section 307 of the Act, 42 U.S.C. (and Supp. V) 1857h-5:

(a)(1)[1] In connection with any determination under section 1857c-5(f) or section 1857f-1(b)(5) of this title, or for purposes of obtaining information under section 1857f-1(b)(4) or 1857f-1(c)(4) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may

[1] So in original, Subsec. (a) was enacted without a par. (2).

administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 1857f-1(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national pri-

mary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857 f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings or enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for

the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

-against-

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

PETITIONER'S REPLY BRIEF

W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
Attorney for Petitioners
Municipal Building
New York, N.Y. 10007
(212) 566-2091

L. KEVIN SHERIDAN,
JOSEPH F. BRUNO,
JOHN C. BRENNAN,

of Counsel

IN THE SUPREME COURT OF THE UNITED STATES
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PRELIMINARY STATEMENT

On June 2, 1977, the City defendants filed with this Court a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Briefs

in opposition to the City's petition were submitted by several parties, including the United States Environmental Protection Agency (EPA).

In its petition, the City cited Environmental Protection Agency v. Brown, 45 U.S.L.W. 4445 (May 3, 1977) and its companion cases for the proposition that the federal government may not require a state to pass regulations in order to implement its transportation control plan (City's petition for cert., pp. 31-32). In its brief in opposition, the EPA attempted to distinguish these cases from the case at bar on the ground that, here, the New York plan had been promulgated by the State of New York. (EPA brief, p. 14). This reply brief is addressed solely and specifically to the issue raised by the EPA, i.e.,

the ability of the Governor to "promulgate" a transportation control plan on behalf of the State, and thereby irreversibly commit the state, without legislative approval or ratification, to a detailed plan to discourage traffic in the Borough of Manhattan.*

ARGUMENT

Section 110 of the Clean Air Act (42 U.S.C. §1857c-5) provides that "[e]ach State shall...submit to the Administrator

*On August 5, 1977, Mr. Justice Marshall, in denying a stay sought by the City, filed an opinion which, inter alia, indicated that he viewed the petitioner's arguments on the merits as less than compelling, noting that the opinion of the Court of Appeals appeared "facially correct" (Opinion, p. 5). As we read the Rules of this Court a reply to that opinion is not in order. We would not, however, have our failure to respond to it taken as acquiescence in its correctness. Moreover, we note that the opinion is entirely silent on this critical issue, which is the linchpin of EPA's argument.

...a plan which provides for implementation, maintenance and enforcement" of air quality standards promulgated by the Administrator of the United States Environmental Protection Agency pursuant to the Act. In April, 1973, purportedly acting pursuant to this provision, then Governor Nelson Rockefeller submitted to the Administrator the "New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls", which embodied a number of strategies designed to discourage automobile usage in the Borough of Manhattan. The plan submitted by the Governor had not been authorized or approved by the New York State Legislature or, indeed, by any other legislative body or officer. Nevertheless, the Second Circuit Court of

Appeals has held that the Governor's submission and the subsequent acceptance of the plan by the Administrator constituted the creation of a binding pact between the state and federal governments, and, by necessary implication, that the Governor of the State of New York was possessed of adequate power to irreversibly bind the State and City to the terms of a far-reaching and highly detailed plan for the control of traffic in New York City. In reaching this conclusion the Court of Appeals totally ignored one of the most fundamental precepts embodied in the constitutions of the United States and each of the fifty states: the doctrine of separation of powers.

The powers of the Governor are set forth in Art. 4, §3 of the New York State Constitution, and include the power "to

expedite all such measures as may be resolved upon by the legislature," and to "take care that the laws are faithfully executed." It is well-settled under New York law that the executive may not encroach upon the functions of the legislative branch nor interfere with its duties. Jaffe v. McGoldrick, 285 App. Div. 889, 137 N.Y.S. 2d 519, (2nd Dept. 1955); People ex rel. Ingenito v. Warden etc. Auburn Prison, 267 App. Div. 295, 46 N.Y.S. 2d 72, (4th Dept. 1943), aff'd, 293 N.Y. 803, 59 N.E. 2d 174, (1944). This principle of separation of powers is essential "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose [is] not to avoid friction, but, by means of the inevitable friction incident to the distribution of

governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting).

The nature and scope of executive power was discussed by this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). That case involved the constitutionality of a presidential order directing the Secretary of Commerce to seize and operate most of the nation's steel mills in order to avert a strike by steel workers. The Court pointed out that executive power must derive either from the Constitution or from an Act of Congress. Id., p. 585. After noting the absence of statutory authorization for the President's action, the Court rejected the government's argument that seizure can

be sustained by virtue of the constitutional grant of executive power:

> "In the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoeing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute..."

Id., p. 587.*

*Although Youngstown Steel involved issues arising under the federal Constitution, the principles set forth therein apply with equal force to the case at bar, since the relevant provisions of the New York State Constitution were modeled on the federal Constitution. The principles of separation of power arising from the N.Y. Constitution are thus the same as those arising under the federal Constitution. Cf. Loma Holding Corp. v. Cripple Bush Realty Corp., 147 Misc. 655, 265 N.Y.S. 125 (S. Ct. N.Y. Co. 1933), aff'd 240 App. Div. 1028, 268 N.Y.S. 995 (1st Dep't 1934), aff'd 265 N.Y. 463, 193 N.E. 272 (1934).

The power of a governor to enter into binding contracts with respect to matters falling within the province of the legislature was dealt with by this Court in Washington Market Co. v. District of Columbia, 172 U.S. 361 (1899). That case involved a suit by a public market seeking, inter alia, damages stemming from alleged wrongful interference by the District with rights arising under a contract between the plaintiff and the governor. In finding that the Governor lacked the authority to bind the District, the Court held:

> "The making of regulations with respect to the use of the market grounds and the establishment of a tariff of charges .... were beyond question within the province of the Legislative Assembly, and any assumption on the part of the Governor, either with or without the sanction of the

> Board of Public Works, of authority to conclude the Legislative Assembly in such matters, would have been purely ultra vires."

Id., p. 370.

In the case at bar, it is clear that the strategies agreed to by former Governor Rockefeller, e.g., the imposition of tolls on certain bridges, are by their nature legislative actions. Yet it is undisputed that the Legislature at no time approved or authorized the challenged Transportation Control Plan, nor did the Legislature delegate to the Governor power to irreversibly commit the State to a far-reaching scheme which, although directed ostensibly at reducing air pollution and controlling traffic in the New York Metropolitan area, will have a severe negative impact on the economy of New York City and the life styles of its

residents. In thus purporting to bind the State, former Governor Rockefeller clearly exceeded his executive authority and infringed upon the powers of the Legislature. Under the rule set forth in Washington Market Co. v. District of Columbia, supra, his attempt to commit the State must be treated as ultra vires, and the State cannot be deemed bound by his action.

Dated: New York, New York
September, 1977

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
City of New York
Attorney for Petitioner
Municipal Building
New York, New York 10007
(212) 566-2091

L. KEVIN SHERIDAN,
JOSEPH F. BRUNO,
JOHN C. BRENNAN,

of Counsel.

LL